2000

Anabasis, Inc. v. Utah Labor Commission : Brief of Respondent

Utah Court of Appeals

Sheryl M. Hayashi; Alan Hennebold; Utah Labor Commission; Attorneys for Respondent.
Larrie A. Carmichael; Attorney for Petitioner.

IN THE UTAH COURT OF APPEALS

ANABASIS, INC.,	)	
	)	
Petitioner Appellant,	)	Court of Appeals No.
	)	20000832-CA
vs.	)	
	)	
UTAH LABOR COMMISSION,	)	
UTAH LABOR COMMISSION	)	
APPEALS BOARD,	)	
	)	Priority 7
Respondent Appellees.	)	

BRIEF OF RESPONDENT, UTAH LABOR COMMISSION

Petition for Review from the
Labor Commission of Utah

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Attorneys for Respondents

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JURISDICTION

The Utah Court of Appeals has jurisdiction over this matter pursuant to Utah Code Ann. §78-2a-3(2)(a) and Utah Code Ann. §34A-2-801(8).

ISSUES AND STANDARDS OF REVIEW

1. Has the Labor Commission correctly interpreted the penalty provisions of §34A-2-211(2) of the Utah Workers Compensation Act?

Section 34A-2-201 of the Utah Workers' Compensation Act ("the Act") requires employers to maintain workers' compensation coverage. Section 34A-2-211(2) of the Act authorizes the Utah Labor Commission, through its Industrial Accidents Division, to penalize employers who fail to maintain coverage.

Anabasis has been a Utah employer since 1994, but did not obtain workers' compensation insurance until February 1999. On March 3, 1999, the Division penalized Anabasis for its noncompliance. This Court is asked to decide whether, under these circumstances, §34A-2-211(2) authorized the penalty.

Preservation of Issue For Appeal: Anabasis raised this issue in proceedings before the ALJ (Record at 39-45) and the Appeals Board (R. 56-58), thereby preserving the issue for judicial appellate review.

Standard of Review: Section 63-46b-16(4)(d) of the Utah Administrative Procedures Act ("UAPA") authorizes Utah's appellate courts to grant relief from agency actions that erroneously interpret the law. "Matters of statutory construction are questions of law that are

reviewed for correctness. This Court will not defer to the Appeals Board's interpretation of §34A-2-211(2), but will apply a "correctness" standard and determine the proper interpretation of the statute for itself." Esquivel v. Labor Commission, 7 P.3d 777, 780 (Utah 2000) (citations omitted).

2. Assuming that §34A-2-211(2) authorizes the penalty, did the Commission abuse its discretion in imposing the penalty against Anabasis?

Section 34A-2-211(2)(a) provides that "the division may impose a penalty against the employer under this Subsection 2." (Emphasis added.) This Court is asked to consider whether the Division properly exercised its discretion under §34A-2-211(2)(a) when it imposed a penalty against Anabasis.

Preservation of Issue For Appeal: Anabasis raised this issue in proceedings before the ALJ (Record at 39-45) and the Appeals Board (R. 56-58), thereby preserving the issue for judicial appellate review.

Standard of Review: Section 63-46b-16(4)(h)(i) of UAPA authorizes Utah's appellate courts to grant relief from agency actions that are "an abuse of discretion delegated to the agency by statute(.)" In Salt Lake City Corp. v. Dept. of Employment Security, 657 P.2d 1312, 1316 (Utah 1982), the Utah Supreme Court stated:

> . . . . where the language of statute indicates a legislative intention to commit broad discretion to an agency to effectuate the purposes of the legislative scheme, we will not substitute our judgment for that of the agency as long as the commission's interpretation has "warrant in the record" and a "reasonable basis in the law."

The Utah Supreme Court reaffirmed the foregoing standard of review in Morton v. Auditing Division, 814 P.2d 581, 587-88 (Utah 1991). Consequently, in reviewing the Commission's decision to impose a penalty against Anabasis, this Court will affirm the Commission's decision unless it exceeds the bounds of reasonableness and rationality." Osman Home Improvement v. Industrial Commission, 958 P.2d 240, 242-43 (Utah App. 1998.)

3. Is Anabasis entitled to an award of reasonable litigation expenses pursuant to the Small Business Equal Access to Justice Act?

Subject to the conditions and limitations of the Small Business Equal Access to Justice Act, Title 78, Chapter 27a, Utah Code Annotated ("SBEAJA" hereafter), this Court has plenary authority over Anabasis' request for litigation expenses in this proceeding.

DETERMINATIVE STATUTES

Imposition of Penalty: With respect to imposition of penalty against Anabasis, §34A-2-211(2) of the Utah Workers' Compensation Act provides:

> **34A-2-211. Notice of noncompliance to employer - Enforcement power of division - Penalty.**
>
> . . . .
>
> (2) (a) Notwithstanding Subsection (1), the division may impose a penalty against the employer under this Subsection (2):
> (i) subject to the notice and other requirements of Title 63, Chapter 46b, Administrative Procedures Act; and
> (ii) if the division believes that an employer of one or more employees is

conducting business without securing the payment of benefits in one of the three ways provided in Section 34A-2-201.
(b) The penalty imposed under Subsection (2)(a) shall be the greater of:
(i) $1,000; or
(ii) three times the amount of the premium the employer would have paid for workers' compensation insurance based on the rate filing of the Workers' Compensation Fund, during the period of noncompliance.
(c) For purposes of Subsection (2)(b)(ii), the premium is calculated by applying rates and rate multipliers to the payroll basis under Subsection (2)(d), using the highest rated employee class code applicable to the employer's operations.
(d) The payroll basis for the purpose of calculating the premium penalty shall be 150% of the state's average weekly wage multiplied by the highest number of workers employed by the employer during the period of the employer's noncompliance multiplied by the number of weeks of the employer's noncompliance up to a maximum of 156 weeks.

Litigation expense: Anabasis's request for litigation expenses is governed by the following provisions of the Small Business Equal Access to Justice Act:

78-27a-3. Definitions.

As used in this act:
(1) "Prevail" means to obtain favorable final judgment, the right to all appeals having been exhausted, on the merits, on substantially all counts or charges in the action and with respect to the most significant issue or set of issues presented, but does not include the settlement of any action, either by stipulation, consent decree or otherwise, whether or not settlement occurs before or after any hearing or trial.
(2) "Reasonable litigation expenses" means court costs, administrative hearing costs, attorney's fees, and witness fees of all necessary witnesses, not in excess of $10,000, which a court finds were reasonably incurred in opposing action covered under this act.
(3) "Small business" means a commercial or business entity, including a sole proprietorship, which does not have more than 250 employees, but does not include an entity which is a subsidiary or affiliate of another entity which is not a small business.
. . . .

78-27a-5. Litigation expense award authorized in appeals from administrative decisions.

(1) In any civil judicial appeal taken from an administrative decision regarding a matter in which the administrative action was commenced by the state, and which involves the business regulatory functions of the state, a court may award reasonable litigation expenses to any small business which is a named party if the small business prevails in the appeal and the court finds that the state action was undertaken without substantial justification.
(2) Any state agency or political subdivision may require by rule or ordinance that a small business exhaust administrative remedies prior to making a claim under this act.

STATEMENT OF THE CASE

Nature of the Case: Anabasis seeks review of the decision of the Commission's Appeals Board affirming the penalty assessed against Anabasis pursuant to §34A-2-211(2) for failure to secure workers' compensation coverage.

Pursuant to the SBEAJA, Anabasis also seeks payment of its litigation expense incurred in this proceeding,

Course of Proceedings: On March 3, 1999, the Commission assessed a penalty of $1,000 against Anabasis pursuant to §34A-2-211(2) of the Act. (R. 16; Addendum A) Anabasis appealed the penalty to the Commission's Adjudication Division. (R. 1-5) On April 14, 2000, an Administrative Law Judge upheld the penalty. (R. 51-55; Addendum B) Anabasis then sought review of the ALJ's decision by the Appeals Board. (R. 56-58) On August 30, 2000, the Appeals Board denied Anabasis's motion for review and affirmed the

penalty. (R. 68-73; Addendum C) Anabasis then filed a petition for review of the Appeals Board's decision with this Court. (R. 74)

Statement of Facts: In denying Anabasis's motion for review, the Appeals Board made findings of fact, set forth in full as follows: (See Addendum C; footnotes from original text included):

> The parties submitted this matter for decision based on the documentary evidence contained in the file. The documentary evidence establishes that Anabasis, a corporation, does business under the name of "John's Salon." The salon has been in business for several years[1] and has had employees during that time.
>
> During October 1998 the Division received information that Anabasis had no workers' compensation coverage. After investigation, the Division concluded the allegation was correct. On February 12, 1999, the Division notified Anabasis that it intended to assess a noncompliance penalty of $1,000, the minimum penalty provided in §34A-2-411(2), against Anabasis for its failure to maintain coverage for the period of November 2, 1998, to January 12, 1999. Anabasis then obtained a policy of workers' compensation insurance with coverage backdated to February 1, 1999. On March 3, 1999, the Division imposed the $1,000 noncompliance penalty against Anabasis.[2]
>
> Although Anabasis has been an employer for six years, it has never

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1 Department of Workforce Services records indicate the salon became active as a Utah employer in 1994 and has employed from two to six employees each calendar quarter since then.

2 The Division chose to commence the penalty period on November 2, 1998, even though Anabasis had failed to obtain workers' compensation insurance for several years prior to that date. Had Anabasis purchased insurance for all prior years at even the minimum available premium, its cost would have exceeded $1,800.

previously obtained workers' compensation coverage. Anabasis's employees have not incurred any work- related injuries.

Anabasis has not challenged the Appeals Board's findings of fact as an issue for appellate review, nor has Anabasis marshaled the evidence in order to contest any of the Appeals Board's findings. Consequently, the Appeals Board's findings of fact are conclusive for purposes of this proceeding. Osman Home Improvement v. Industrial Commission, 958 P.2d 240, 241, footnote 1 (Utah App. 1998).

However, Anabasis' brief at page 9 includes as an additional representation of "fact" the statement that Anabasis "thought it had all necessary business insurance." The only source for this statement is in the written argument that Anabasis previously submitted to the ALJ. (R. 2) The evidentiary record does not support this representation and it was not included in the Appeals Board's findings of fact. The representation should be disregarded for purposes of this proceeding.

SUMMARY OF ARGUMENT

Contrary to the argument advanced by Anabasis, the language, purpose and history of §34A-2-211(2) of the Act establish the Commission's authority to penalize Anabasis for its past failure to obtain workers' compensation coverage. This Court should affirm the Appeals Board's decision in this matter as a correct interpretation of §34A-2-211(2).

The Appeals Board has appropriately considered the stipulated facts surrounding Anabasis's failure to obtain coverage and has reasonably and rationally exercised the

discretion granted in §34A-2-211(2) by imposing a penalty against Anabasis.

Finally, because Anabasis has failed to satisfy several of SBEAJA's criteria for an award of litigation expenses, this Court should deny Anabasis' request for an award of such expenses.

POINT ONE: THE APPEALS BOARD HAS CORRECTLY INTERPRETED THE PENALTY PROVISIONS OF §34A-2-211(2) OF THE ACT.

The threshold issue in this proceeding is whether the Commission was authorized by §34A-2-211(2) of the Act to impose a penalty against Anabasis under the circumstances of this case. Anabasis argues that §34A-2-211(2)'s penalty can only be imposed against employers who remain uninsured on the date the penalty is imposed. This Court should reject this argument as inconsistent with the language, purpose and history of the statute.

Anabasis' argument is inconsistent with the language of the statute when read as a whole. Section §34A-2-211(2) allows the Commission to penalize employers conducting business without workers' compensation coverage. It is undisputed that, at the time the Commission began the process of penalizing Anabasis, Anabasis did not have coverage. The Commission proceeded in this matter by following §34A-2-211(2)'s procedural requirements as well as its provisions for computing the amount of penalty. By the time the Commission actually assessed the penalty in question, Anabasis had obtained coverage.

Section §34A-2-211(2)(a)(b) provides that an employer's penalty for failure to obtain coverage shall be the greater of $1,000 or "three times the amount of the premium the

employer would have paid for workers' compensation insurance . . . during the period of noncompliance." (Emphases added) At §34A-2-211(2)(d), the statute again references "the period of the employer's noncompliance" as well as "the number of weeks of the employer's noncompliance."

The significance of the statute's use of the term "the period of noncompliance" and other similar terms is that such terms manifest a recognition that §34A-2-211(2)'s penalty is imposed for a finite period in which an employer has failed to maintain coverage, which period of noncompliance may be ended by the time the penalty is imposed. In other words, the statute does not require that the employer's lack of workers' compensation coverage continue through the date on which the penalty is imposed.

As the Utah Supreme Court stated in Cathco v. Valentine Crane Brunjes Onyon Architect, 944 P.2d 365, 369 (Utah 1997): "It is well established that a statute should be read as a whole." When §34A-2-211(2) is read as a whole, it supports the Appeals Board's decision that Anabasis is subject to penalty for its past failure to obtain workers' compensation coverage.

Anabasis' argument is inconsistent with purpose and history of §34A-2-211(2). "In construing the meaning of a statute, the courts must consider the history of the subject matter involved, the end to be achieved, the mischief to remedied and the purpose to be accomplished." *Sutherland Statutes & Statutory Construction, 6th ed.*, Vol. 2A, §45.02. Or, as once observed by Justice Oliver Wendell Holmes, "a page of history is worth a volume

of logic." New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921).

What is now §34A-2-211(2) was first proposed by the Utah Workers' Compensation Advisory Council.[3] At a meeting on June 23, 1994, a Council member suggested that the Council consider penalties as a means of addressing problems with uninsured employers. (See Addendum D, which contains the Advisory Council and Legislative materials pertinent to §34A-2-211(2) that are cited in this brief.) At the Council's meeting on September 15, 1994, the issue of enforcing coverage requirements was discussed again. One of the specific problems considered by the Council was that, under then-existing law, uninsured employers could wait until they were summoned into the district court in a compliance proceeding before obtaining insurance, and thereby escape any consequence for their past failure to carry insurance. (Addendum D)

As a result of the foregoing considerations, the Advisory Council recommended the substance of what is now §34A-2-211(2) to the 1995 Utah Legislature in the form of Senate Bill 124, sponsored by Senators Buhler and Steele. In his comments in support of the proposal before the Senate Business Labor and Economic Development Committee on February 17, 1995, (Addendum D) Senator Buhler included the following explanation of the Bill's purpose:

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3 The Council exists pursuant to §34A-2-107 of the Act and is specifically charged with the responsibility of "advising the commission, the division, and the Legislature on the Utah workers' compensation and occupational disease laws," among other duties.

. . . . As you are probably aware . . . (a)ll employers are required to carry workers' compensation insurance and while the Industrial Commission works hard to try and make sure that everybody is in compliance with this, we have continually about 10% of our employers who do not have coverage. And the problem is . . . that too often it is less expensive for an employer to not have insurance, to get caught, to get insurance and then drop their insurance than it is to just carry the insurance and be a good citizen like they should be. So of course, when they are not insured then everybody has to pick up the burden when the worker is injured. . . . Here are the provisions of Senate Bill 124 which are meant to address this. . . . .

Ms. Sewell, Director of the Commission's Industrial Accidents Division, provided additional explanation in response to questions by committee members:

. . . . But we're talking mainly about . . . small employers, less than 5 to 10 employees and we go after them, it takes us awhile to catch them, and then they'll take out a policy for a quarter and then the next quarter they'll fail to pay the premium again and we're back out after them again, we can't levy a penalty against them right now if they walk into court with the insurance in hand even if they've been out of compliance for a number of months, we can't impose a penalty at the time we get them into court to close them down if they have an insurance policy in hand. And so, essentially what they do is go months and months without insurance sometimes. . . . .

Senator Buhler then made the following closing comment:

We've really put the Industrial Commission in the situation of a dog chasing its tail on these kinds of things. We just really need to give it some teeth so that we can go after that small minority . . . of employers who do not provide this coverage and make it more expensive for them than if they have the coverage.

Senate Bill 124 was ultimately approved by both the Senate and House of Representatives and signed by the Governor. It became effective on May 1, 1995.

The foregoing legislative history establishes that the purpose of Senate Bill 124, now

codified as §34A-2-211(2), was to allow the Commission to impose a penalty against employers for periods when the employer failed to maintain workers' compensation coverage, even if the employer subsequently obtained such coverage.

From the date §34A-2-211(2) was enacted, the Commission has applied it in a consistent manner and has frequently assessed a penalty against employers who failed to maintain coverage in the past, but then obtained such coverage prior to imposition of penalty. The Legislature has had occasion to amend or recodify the statute on several occasions since then. Most notably, in 1997 the Legislature clarified that the provisions of §34A-2-211(2) were independent of, and in addition to, the older enforcement provisions found in §34A-2-211(1). It is significant that the Legislature did not use these opportunities to amend §34A-2-211(2) to remove employers in Anabasis' circumstances from the statute's coverage.

The Legislature's action in amending the statute, but leaving intact the basis for the Commission's application of the statute, indicates legislative approval of the Commission's interpretation and application of the statute. "When (a) statute giving rise to (a) longstanding interpretation has been reenacted without pertinent change, the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." Federal Deposit Ins. Corp. v. Philadel., 106 S. Ct. 1931(1986), 90 L.Ed. 2d 428. Similarly, 82 *CJS*, "Statutes," §346 at p. 456-57, states the general rule:

> Executive construction is entitled to additional weight where it has been impliedly endorsed by the legislature as by the re-enactment of the statute, or the passage of a similar one, in the same or substantially similar terms. That is, when administrative interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute generally indicates an intent to incorporate the administrative interpretation as well.

In summary, §34A-2-211(2) was enacted to prevent employers from shirking their obligation to provide workers' compensation coverage for their employees, then escaping the consequence of their dereliction by obtaining coverage before enforcement action could be taken against them. Section 34A-211(2) remedies the problem by allowing the Commission to impose a penalty for periods of noncompliance even when the period of noncompliance has ended before the date on which the penalty is actually imposed.

POINT TWO: IMPOSITION OF PENALTY AGAINST ANABASIS WAS A REASONABLE EXERCISE OF THE COMMISSION'S DISCRETION UNDER §34A-2-211(2) OF THE ACT.

Section 34A-2-211(2)(a) provides that the Commission "may" penalize employers who fail to obtain workers' compensation coverage. The amount of penalty is the greater of a) $1,000 or b) three times the premium the employer would have paid for workers' compensation insurance during the period of its noncompliance. It was the minimum penalty of $1,000 that was assessed against Anabasis.

The parties agree that the word "may" as used in §34A-2-211(2)(a) constitutes a legislative grant of discretion to the Commission, acting through its Industrial Accidents Division, to determine whether the penalty should be imposed in any particular case.

Anabasis contends the Division did not properly exercised this discretion when it imposed a penalty against Anabasis.

As a preliminary matter, Anabasis asserts it is Commission policy to impose a penalty whenever an employer is found to be without workers' compensation coverage. The record contains no evidence to support this assertion. In fact, the assertion is incorrect. For example, it is not Commission policy to assess penalty when an employer has been without coverage for a short period of time due to errors or mistakes beyond its control. (See the Commission's decision In the matter of Arnold & Wiggins, dated August 31, 1999, and attached as Addendum E.)

Anabasis also contends the Appeals Board should have considered whether Anabasis had reasonable justification for its failure to obtain workers' compensation coverage. Specifically, Anabasis claims it relied upon an insurance agent to procure "all necessary insurance." However, evidentiary record does not substantiate Anabasis' representation that it reasonably relied upon an insurance agent in this matter. Without the necessary evidence on this point, the Appeals Board could not consider it as justification for Anabasis' failure to obtain insurance.

But even if, for purposes of discussion, it is assumed that Anabasis did rely on the assistance of an insurance agent, the undisputed fact remains that Anabasis failed to obtain coverage for a period of six years. This long-term lack of attention to the mandatory and universal coverage requirements of the Utah Workers' Compensation Act is, in its own right,

a reasonable basis for imposition of penalty.

Finally, Anabasis contends the Appeals Board did not explained the basis for its decision to impose a penalty.

The Commission recognizes that adequate findings of fact and the rationale for its ultimate conclusions must be included in adjudicative decisions. Adams v. Industrial Commission, 821 P.2d 1, 5 (Utah App. 1991). In this case, the Appeals Board's decision noted that Anabasis's employees had not filed claims for workers' compensation benefits, a fact which tended to mitigate Anabasis's failure to obtain coverage. But the Appeals Board also found that Anabasis had been in business without workers' compensation coverage for six years. Additionally, the Appeals Board found that Anabasis would have paid at least $1,800 in workers' compensation premiums during those six years had it obtained such insurance. (R. 68-69) The Appeals Board then concluded that the foregoing facts, taken together, supported imposition of penalty.

In summary, the scope of the Appeals Board's decision in this matter was dictated by the stipulated evidence and the narrow legal issues in dispute. In that light, the Appeals Board reasonably affirmed the penalty imposed against Anabasis.

POINT THREE: ANABASIS IS NOT ENTITLED TO AN AWARD OF LITIGATION EXPENSES PURSUANT TO THE SMALL BUSINESS EQUAL ACCESS TO JUSTICE ACT.

Anabasis asks this Court to order the Commission to pay Anabasis's litigation expenses incurred in this proceeding, pursuant to §78-27a-5(1) of the Small Business Equal

Access to Justice Act. Section 78-27a-5(1) provides:

> In any civil judicial appeal taken from an administrative decision regarding a matter in which the administrative action was commenced by the state, and which involves the business regulatory functions of the state, a court may award reasonable litigation expenses to any small business which is a named party if the small business prevails in the appeal and the court finds that the state action was undertaken without substantial justification.

This proceeding clearly involves a civil judicial appeal of administrative action commenced by the Commission and involving a business regulatory function of the state, thereby meeting some of the threshold requirements of §78-27a-5(1). However, Anabasis has failed to establish that it is a "small business" within the meaning of §78-27a-5. In particular, §78-27a-3(3) of SBEAJA defines a small business as "a commercial or business entity . . . which does not have more that 250 employees, but does not include an entity which is a subsidiary or affiliate of another entity which is not a small business." (Emphasis added.) Because Anabasis has failed to present evidence that it is not "a subsidiary or affiliate of another entity which is not a small business,"it has failed to meet the definition of a small business.

Furthermore, Anabasis is only entitled to an award of litigation expense if it "prevails" in this appeal. Section 78-27a-3(1) of SBEAJA defines the term "prevails" as "obtain(ing) favorable final judgment . . . on the merits, on substantially all counts . . . and with respect to the most significant issue or set of issues presented. . . ." As discussed in Points I and II of this brief, Anabasis should not prevail on the merits of any of the issues it has raised in this proceeding.

Finally, §78-27a-5(a) conditions any award of litigation expense on a finding that the Commission's imposition of penalty against Anabasis "was undertaken without substantial justification." The Commission respectfully submits it has had a substantial justification for all actions taken in this matter.

In V-1 Oil Company v. Utah State Tax Commission, 942 P.2d 906, 915 (Utah 1996), the Utah Supreme Court denied V-1 Oil Company's claim for litigation expenses pursuant to SBEAJA. Although not necessary to the rationale of the Court's decision, the Court commented as follows:

> Clearly, acting 'without substantial justification' cannot be read so broadly as to encompass every case in which the state loses. . . . We can conceive of instances in which the state could be found to act without substantial justification. For instance, if a state agency arbitrarily interpreted a statute to the detriment of a small business, this abuse of the agency's power by exceeding its scope of discretion in interpreting a statute would support a finding that the state had acted 'without substantial justification."

Other courts have also considered the meaning of the phrase "substantial justification." In Pierce v. Underwood, 487 U.S. 552, 566, note 2, the United States Supreme Court made the following comment: "But a point can be justified even though it is not correct, and we believe it can be substantially (i.e. for the most part) justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact."

This brief has elaborated the Appeals Board's interpretation and application of §34A-2-211(2). The Commission believes the Appeals Board's decision is correct in light of the language of the statute, its purpose and its history. But even the decision is in error, such an error would, at most, constitute a mistake. It would not rise to the level of an arbitrary

abuse of discretion sufficient to trigger the provisions of SBEAJA.

CONCLUSION

The Commission respectfully urges this Court to affirm the Appeals Board's interpretation and application of the provisions of §34A-2-211(2) and to uphold the Appeals Board's imposition of penalty against Anabasis for its failure to obtain the workers' compensation coverage mandated by the Utah Worker's Compensation Act. The Commission further requests that this Court deny Anabasis' request for an award of its litigation expenses incurred in this proceeding.

Dated this 13th day of March, 2001.

Alan Hennebold
General Counsel
Utah Labor Commission

CERTIFICATE OF SERVICE

This certifies that the undersigned served the foregoing Brief of Respondent this 13 day of March, 2001, by mailing two copies first class mail with sufficient postage prepaid to the following:

LARRIE A. CARMICHAEL
130 NORTH FAIRFIELD
LAYTON UT 84041-3926

Tab A

Certified Article Number
P 975 278 332
SENDERS RECORD

STATE OF UTAH
LABOR COMMISSION
160 East 300 South, 3rd Floor
P.O. Box 146610
Salt Lake City, Utah 84114-661

INDUSTRIAL COMMISSION OF UTAH
Anabasis #3
EXHIBIT NO. _____
Recd w/reply on 9 July 99

In the Matter of the Noncompliance of:

Anabasis Inc
130 N Fairfield Rd
Layton UT 84040

DETERMINATION AND ORDER
DECLARING NONCOMPLIANCE AND
ASSESSING A PENALTY

CASE No: 98-10-85827

DETERMINATION

The Labor Commission of Utah hereby finds that Anabasis Inc failed to provide workers' compensation insurance for it employees as required by law from November 02, 1998 to January 12, 1999.

The Highest number of employees working for Anabasis Inc during the period of noncompliance was 3, with the highest rated employee class code of 9586 Barber Or Beauty Shop. Using the rate and rate multipliers of 0.0077 for November 02, 1998 to January 12, 1999 for 72 days of noncompliance and 150% of the state's average weekly wage, resulting in a penalty assessment of $1,000.00.

ORDER

Pursuant to §34A-2-201, Utah Code Ann., Anabasis Inc is ordered to pay $1,000.00 to the Uninsured Employers' Fund as a penalty for noncompliance for the time period of: November 02, 1998 to January 12, 1999.

IT IS FURTHER ORDERED that should this ORDER go to collection that this judgement shall be augmented in the amount of reasonable cost & attorney's fees expended in collecting said judgement.

If you disagree with this DETERMINATION and ORDER, you have THIRTY (30) DAYS to appeal pursuant to §34A-2-211(4), Utah Code Ann., or this order becomes final. Any appeal shall be made to the Labor Commission and must specify the facts and reasons for objecting to the order.

DATE ORDER ISSUED: 3/3/99 By: Joyce A. Sewell
Joyce A. Sewell
Director, Industrial Accidents Division

APPEAL PROCESS IS ON ATTACHED SHEET

APPEAL PROCESS

Pursuant to §34A-2-801, Utah Code Ann., a party aggrieved by this Order may appeal by filing a request for a hearing with the Adjudication Division of the Labor Commission. Pursuant to §63-46b-12, Utah Code Ann., any such request for hearing **must** be **received** by the Adjudication Division within **30 days** from the date this Order is **signed** and must state the grounds on which the appeal is based. Appeals should be mailed to the following address:

Larry Williams
State Of Utah
Labor Commission
P.O. Box 146612
Salt Lake City, Utah 84114-6612

The employer's appeal shall specify the facts that are in question and the basis of the employer's objection to the determination, imposition, or the amount of the penalty.

Any appeal must be received by the Labor Commission within 30 days of the date of issuance in writing. If appeals are not received within the 30 day rule all appeal rights are forfeited.

An administrative hearing will be held in accordance with §34A-2-801, Utah Code Annotated.

After a penalty order has been issued and becomes final, the commission may file an abstract for any uncollected penalty in district court. The abstract shall state the amount of the uncollected penalty, reasonable attorney's fees, cost of collection, and court cost. The filed abstract shall have the effect of a judgement of that court. §34A-2-211(5), Utah Code Annotated

CERTIFICATE OF MAILING

On 3/03/99, I mailed, first class postage prepaid, a copy of the foregoing DETERMINATION AND ORDER DECLARING NONCOMPLIANCE AND ASSESSING A PENALTY, to each of the following:

Anabasis Inc
130 N Fairfield Rd
Layton UT 84040

Carma R Weis
Compliance Officer

Tab B

Utah Labor Commission
Adjudication Division
Case No. 1981085827

IN THE MATTER OF NONCOMPLIANCE:	*	
	*	**FINDINGS OF FACT,**
ANABASIS INC	*	**CONCLUSIONS OF LAW**
	*	**AND ORDER**
	*	

HEARING: July 7,1999 at 10 a.m.
Labor Commission of Utah
Hearing Room 336
160 East 300 South
Salt Lake City, Utah 84114-6615

BEFORE: Donald L. George, Administrative Law Judge (ALJ).

APPEARANCES: Anabasis,Inc. (Anabasis or petitioner) is represented by attorney Larrie Carmichael.

The Industrial Accidents Division (the Division) of the Labor Commission is represented by attorney Sheryl Hayashi.

At the hearing, no testimony was taken, and only documentary evidence was received. Having reviewed the file, the evidence and written arguments, the ALJ finds and concludes as follows:

Anabasis, Inc. is a Utah corporation operating a beauty salon at 1300 North Fairfield Road, Layton, Utah. It is undisputed that Anabasis had employees during the period in question from November 2, 1998 through January 12,1999, but did not have workers compensation insurance in force during that period. It is also undisputed that Anabasis did not have during that period nor has it ever had a compensable industrial accident or occupational disease claim during its operation.

Anabasis obtained workers comp insurance coverage, effective February 1, 1999.

Subsequently, on February 12,1999 the Industrial Accidents Division issued a Notice of Noncompliance and Intent to Assess Penalty. Anabasis timely answered that notice on February 16, 1999. On March 3, 1999, the Division issued a Determination and Order Declaring Noncompliance and Assessing a Penalty (in the statutory

minimum alternative amount of $1,000), which Determination and Order was appealable within the succeeding 30 days.

Anabasis timely filed an appeal and argues on the following grounds:

1. U.C.A. Section 32A-2-211(b) should be interpreted so that obtaining workers compensation coverage within 15 days of the Notice of Noncompliance and Intent to Assess Penalty (or as here, before the 15 day period even begins), is a bar to the imposition of any penalty under Section 34A-2-211(2)(b).

2. asking for a reasonable exercise of discretion on findings (such as substantial compliance with the law on the part of Anabasis) and no penalty (Anabasis deeming a $1000 penalty as excessive and unconscionable in this matter).

The applicable statutory sections are:

> 34A-2-211. Notice of noncompliance to employer -- Enforcement power of division -Penalty.
>
> (1) (a) In addition to the remedies specified in Section 34A-2-210, if the division has reason to believe that an employer is conducting business without securing the payment of benefits in one of the three ways provided in Section 34A-2-201, the division may give that employer written notice of the noncompliance by certified mail to the last-known address of the employer.
>
> (b) If the employer does not remedy the default within 15 days after delivery of the notice, the division may issue an order requiring the employer to appear before the division and show cause why the employer should not be ordered to comply with Section 34A-2-201.
>
> (c) If it is found that the employer has failed to provide for the payment of benefits in one of the three ways provided in Section 34A-3-201, the division may require any employer to comply with Section 34A-2-201.

> (2) (a) Notwithstanding Subsection (1), the division may impose a penalty against the employer under this Subsection (2):
>
> (i) subject to the notice and other requirements of Title 63, Chapter 46b, Administrative Procedures Act; and
>
> (ii) if the division believes that an employer of one or more employees is conducting business without securing the payment of benefits in one of the three ways provided in Section 34A-2-201.
>
> (b) The penalty imposed under Subsection (2)(a) shall be the greater of:
>
> (i) $1,000; or
>
> (ii) three times the amount of the premium the employer would have paid for workers' compensation insurance based on the rate riling of the Workers' Compensation Fund of Utah during the period of noncompliance.

When subsections (1) (a) through (c) are read in sequence, it is clear that if the Industrial Accidents Division has a reasonable belief that an employer is uninsured, it may require by certified mail notice that the employer prove within 15 days that it has workers compensation coverage, or if the employer fails to show cause why coverage is unnecessary, an order requiring compliance [i.e., requiring the employer to obtain insurance] will issue. Such an order can be a prelude to a civil action against the employer under Section 34A-2-210, or criminal actions under Section 34A-2-209 or Section 34A-2-802. If, as in this case, the employer responds with timely proof that it has coverage, no order would issue. To that extent, Anabasis is correct that it was not in violation from February 1,1999 on, and therefore no further order could issue *requiring it to obtain insurance*.

Arriving at that conclusion does not preclude application of 34A-2-211(2) as Subsection (b) thereof clearly states that the Division may impose a penalty notwithstanding Subsection (1), in an amount three times the premium *during the period of noncompliance* (emphasis added). It follows logically that if the opening statement in Section 2 (a) disallows section 1, it does so in its entirety, not piecemeal. Therefore, discussion of the 15 day period in Section 1 is irrelevant, as is Anabasis' focus on the date of compliance. The penalty is imposed for the period when Anabasis had employees but did not have coverage. That period is not disputed as being from November 2, 1998 through January 12,1999.

Anabasis second contention is that the Division has not exercised discretion because it chose to impose a penalty (as the statute allows), and because the penalty was for $1,000. The choice to impose a penalty or not, is in fact a discretionary act. The amount of the penalty is not a discretionary act as it is mandated by Section 34A-2-211(2) (b) to be the greater of $1,000 or three times the premium for the period of noncompliance. The Division followed that statutory mandate and properly imposed the $1,000 penalty. Anabasis has not provided any case law that would allow the Division, the Administrative Law Judge, or the Labor Commission to impose, reduce, or suspend that $1,000 penalty. Accordingly, the penalty should be affirmed.

ORDER

IT IS THEREFORE ORDERED that the Industrial Accidents Division's March 3, 1999 Determination and Order Declaring Noncompliance and Assessing a Penalty, dated, against Anabasis, Inc., is hereby affirmed in its entirety.

NOTICE OF APPEAL RIGHTS

A party aggrieved by this decision may file a Motion for Review with the Adjudication Division of the Utah Labor Commission. The Motion for Review must set forth the specific basis for review and must be received by the Commission within 30 days from the date the decision is signed. Other parties may then submit their Responses to the Motion for Review within 20 days of the date of the Motion for Review.

Any party may request that the Appeals Board of the Utah Labor Commission conduct the foregoing review. Such request must be included in the party's Motion for Review or its Response. If none of the parties specifically requests review by the Appeals Board, the review will be conducted by the Utah Labor Commissioner.

DATED this 14th day of April, 2000.

UTAH LABOR COMMISSION

Donald L. George
Administrative Law Judge

MAILING CERTIFICATE

I hereby certify that on the **14th day of April, 2000** I mailed a copy of the attached **Findings of Fact, Conclusions of Law and Order**, postage prepaid to the following:

ANABASIS INC
1300 NO FAIRFIELD RD
LAYTON UT 84041

LARRIE CARMICHAEL ESQ
130 NO FAIRFIELD
LAYTON UT 84040

JOYCE SEWELL DIRECTOR
INDUSTRIAL ACCIDENTS DIVISION
UTAH LABOR COMMISSION
(interoffice)

SHERYL HAYASHI ESQ
UTAH LABOR COMMISSION
(interoffice)

LORETTA WOODMANSEE
SUPPORT SPECIALIST

Tab C

APPEALS BOARD
UTAH LABOR COMMISSION

In the matter of: noncompliance of ANABASIS INC,	*	ORDER DENYING MOTION FOR REVIEW Case No. 1981085827

Anabasis Inc. asks the Appeals Board of the Utah Labor Commission to review the Administrative Law Judge's assessment of penalty against Anabasis pursuant to §34A-2-211(2) of the Utah Workers' Compensation Act ("the Act").

The Appeals Board exercises jurisdiction over this motion for review pursuant to Utah Code Ann. §§63-46b-12, 34A-2-211(4)(c), and 34A-2-801(3).

BACKGROUND

Section 34A-2-201 of the Act requires Utah employers to maintain workers' compensation coverage. Under §34A-2-211(2) of the Act, the Commission's Industrial Accidents Division may penalize employers doing business without such coverage. Pursuant to these provisions of the Act, the Division assessed a penalty of $1,000 against Anabasis for the period of its noncompliance. Anabasis appealed the penalty to the Commission's Adjudication Division, which affirmed the penalty. Anabasis then sought Appeals Board review of the ALJ's decision.

ISSUES PRESENTED

Anabasis contends it is not subject to penalty under §34A-2-211(2) because it obtained coverage before the penalty was actually imposed. Anabasis also contends the ALJ's decision lacks adequate findings to support imposition of the penalty.

FINDINGS OF FACT

The parties submitted this matter for decision based on the documentary evidence contained in the file. The documentary evidence establishes that Anabasis, a corporation, does

business under the name of "John's Salon." The salon has been in business for several years[1] and has had employees during that time.

During October 1998 the Division received information that Anabasis had no workers' compensation coverage. After investigation, the Division concluded the allegation was correct. On February 12, 1999, the Division notified Anabasis that it intended to assess a noncompliance penalty of $1,000, the minimum penalty provided in §34A-2-411(2), against Anabasis for its failure to maintain coverage for the period of November 2, 1998, to January 12, 1999. Anabasis then obtained a policy of workers' compensation insurance with coverage backdated to February 1, 1999. On March 3, 1999, the Division imposed the $1,000 noncompliance penalty against Anabasis.[2]

Although Anabasis has been an employer for six years, it has never previously obtained workers' compensation coverage. Anabasis's employees have not incurred any work- related injuries.

DISCUSSION AND CONCLUSION OF LAW

Section 34A-2-201 of the Utah Workers' Compensation Act imposes the following obligation on Utah employers (emphasis added):

> An employer shall secure the payment of workers' compensation benefits for its employees by:
> (1) **insuring, and keeping insured**, the payment of this compensation with the Workers' Compensation Fund of Utah;
> (2) **insuring, and keeping insured**, the payment of this compensation with any stock corporation or mutual association authorized to transact the business of workers' compensation insurance in this state; or
> (3) obtaining approval from the division in accordance with Section 34A-2-201.5 to pay direct compensation . . . .

---

[1] Department of Workforce Services records indicate the salon became active as a Utah employer in 1994 and has employed from two to six employees each calendar quarter since then.

[2] The Division chose to commence the penalty period on November 2, 1998, even though Anabasis had failed to obtain workers' compensation insurance for several years prior to that date. Had Anabasis purchased insurance for all prior years at even the minimum available premium, its cost would have exceeded $1,800.

Those employers who violate §34A-2-201 by failing to maintain workers' compensation coverage are subject to the penalty authorized by §34A-2-211(2) of the Act:

> Notwithstanding Subsection (1), the division may impose a penalty against the employer under this Subsection (2):
> (i) subject to the notice and other requirements of Title 63, Chapter 46b, Administrative Procedures Act; and
> (ii) if the division believes that an employer of one or more employees is conducting business without securing the payment of benefits in one of the three ways provided in Section 34A-2-201.
> (b) The penalty imposed under Subsection (2)(a) shall be the greater of:
> (i) $1,000; or
> (ii) three times the amount of the premium the employer would have paid for workers' compensation insurance based on the rate filing of the Workers' Compensation Fund of Utah during the period of noncompliance.
> (c) For purposes of Subsection (2)(b)(ii), the premium is calculated by applying rates and rate multipliers to the payroll basis under Subsection (2)(d), using the highest rated employee class code applicable to the employer's operations.
> (d) The payroll basis for the purpose of calculating the premium penalty shall be 150% of the state's average weekly wage multiplied by the highest number of workers employed by the employer during the period of the employer's noncompliance multiplied by the number of weeks of the employer's noncompliance up to a maximum of 156 weeks.

While the imposition of penalty is discretionary with the Industrial Accidents Division, the amount of penalty is fixed by the foregoing statute and cannot be altered.

In challenging the noncompliance penalty imposed against it, Anabasis does not deny that it had employees during the period in question, nor does it claim to be exempt from the Act's coverage requirements or that it complied with those coverage requirements. Instead, Anabasis argues no penalty can be imposed because it obtained coverage prior to the date the Division actually assessed the penalty. In other words, Anabasis argues that the statutory penalty can be imposed only for continuing lapses of coverage. The entire justification for Anabasis's argument is found in §34A-2-211(2)(a)(ii), authorizing the Division to impose a penalty "if the Division believes that an employer . . . **is conducting** business" without coverage. (Emphasis added.)

In considering Anabasis's argument, it is appropriate to read §34A-2-211(2) in its entirety, rather than focus on a single passage out of context. As the Utah Supreme Court stated in Cathco v. Valentine Crane Brunjes Onyon Architect, 944 P.2d 365, 369 (Utah 1997): "It is well

established that a statute should be read as a whole." Similarly, in Andrus v. Allred, 17 Utah 2d 106, 109 (Utah 1965) the Court stated:

> (O)ne of the fundamental rules of statutory construction is that the statute should be looked at as a whole and in the light of the general purpose it was intended to serve; and should be so interpreted and applied as to accomplish that objective. (Footnote omitted.) In order to give the statute the implementation which will fulfill its purpose, reason and intention sometimes prevail over technically applied literalness.

The language of §34A-2-211(2), when read as a whole and in light of its intended purpose, indicates its operation is not confined only to continuing violations, but also applies to instances of past violations. For example, various subsections of §34A-2-211(2) refer to "the period of noncompliance," which suggests circumstances where the beginning date and ending date of the employer's noncompliance is known. The Appeals Board therefore concludes that §34A-2-211(2) permits penalties against employers who have failed to maintain coverage, whether or not the employer has later obtained coverage.

Anabasis also argues that an inadequate factual basis exists to support the Division's exercise of discretion in penalizing Anabasis. The Appeals Board finds no merit to this argument. To the contrary, the basis for the Division's imposition of penalty against Anabasis has been set forth in the orders of the Division and the ALJ, as well as in this decision. Furthermore, Anabasis does not challenge any of the facts on which the penalty is based. Under these circumstances, there has been no abuse of discretion in the imposition of penalty against Anabasis pursuant to §34A-2-211(2).

In summary, the Appeals Board concludes that under the admitted facts of this case, §34A-2-211(2) of the Act authorizes imposition of a $1,000 penalty against Anabasis.

ORDER

The Appeals Board affirms the decision of the ALJ and denies Anabasis's motion for review. It is so ordered.

Dated this 30th day of August, 2000.

Colleen S. Colton, Chair

L. Zane Gill

Patricia S. Drawe

NOTICE OF APPEAL RIGHTS

Any party may ask the Labor Commission to reconsider this Order. Any such request for reconsideration must be received by the Labor Commission within 20 days of the date of this order. Alternatively, any party may appeal this order to the Utah Court of Appeals by filing a petition for review with the court. Any such petition for review must be received by the court within 30 days of the date of this order.

CERTIFICATE OF MAILING

I certify that a copy of the foregoing Order Denying Motion For Review in the matter of Anabasis, Inc., Case No. 1981085827, was mailed first class postage prepaid this 3rd day of August, 2000, to the following:

ANABASIS INC.
130 NORTH FAIRFIELD
LAYTON UT 84041

SHERYL M. HAYASHI, ATTORNEY
UNINSURED EMPLOYERS FUND
P O BOX 146600
SALT LAKE CITY UT 84114-6600

LARRIE A. CARMICHAEL, ATTORNEY
130 NORTH FAIRFIELD
LAYTON UT 84041-3926

Sara Jenson
Support Specialist
Utah Labor Commission

Orders\1981085827

Tab D

THE INDUSTRIAL COMMISSION OF UTAH
WORKERS' COMPENSATION ADVISORY COUNCIL

Thursday, June 23, 1994, 12:00 P.M.
Room 336, Heber M. Wells Building

The following Advisory Council members were in attendance:
Larry D. Bunkall, President, Utah Manufacturers Association
Steve Richins, Sec/Treasurer, Utah Building & Construction Trades Association
Eddie P. Mayne, President, Utah AFL-CIO
Arthur Sandack, Attorney
David Bird, Attorney (substituting for James Elegante)
L. Craig Miller, Kennecott Corporation

Advisory Council members excused:
Pat S. Drawe, Sr. Attorney, Questar Corporation
Patrick J. O'Connor, President, Injured Workers Association of Utah

Advisory Council members absent:
Jack McQuivey

Advisory Council ex officio members in attendance:
Alan L. Colledge, RPT, MD.
Lane A. Summerhays, CEO, Workers Compensation Fund of Utah
Robert E. Wilcox, Commissioner, Utah Insurance Department

Legislative Liaison absent:
Representative Gerry A. Adair

Others Present:
Stephen M. Hadley, Chairman
Thomas R. Carlson, Commissioner
Colleen S. Colton, Commissioner
Joyce A. Sewell, Director, Industrial Accidents
Dennis Lloyd, Vice Pres. & General Counsel, Workers Compensation Fund of UT
Erie V. Boorman, Administrator, Employers' Reinsurance Fund
Brian Allred, Office of Legislative Research & General Council
Brian Kelm, Attorney
Roger Pusey, Deseret News
Marina O'Neil, Standard Examiner
Scott Kelly, Utah Self Insured Association
Rich Bier, Intermountain Health Care
Robert Bergman, Utah Mechanical Contractors Association
Shelley Kaas, Diversified
Colleen Clark, Diversified
Recording Secretary: Patricia Ashby

WELCOME BY CHAIRMAN STEPHEN M. HADLEY

Chairman Stephen M. Hadley officially brought the meeting to order and explained the provisions of open meeting Utah law which the Commission has met.

Because there was not a full quorum of the Council in attendance at the beginning of the meeting, Chairman Hadley postponed approval of the minutes until later and began the meeting with the second item on the agenda.

1. SUNSET AUDIT REVIEW

Chairman Hadley explained the 1984 Sunset Audit which occurs every 10 years made recommendations that primarily addressed the Employers' Reinsurance Fund and that the issues put in motion at that time were somewhat culminated in the 1994 Legislative Session.

The Commission has just been through the 1994 version of the Sunset Audit process, at which time the Legislature authorized the extension of the Industrial Commission for another 10 year period. He presented to the Council some of the Commission's observations made to the Legislature in conjunction with the budgetary matters and Commission needs.

Workforce Continued Growth: Chairman Hadley discussed how the workforce growth of 7.7% in the year 1993/94 impacts the Industrial Commission immensely in the areas it oversees - workers' compensation, anti-discrimination, wage and hour, labor issues, occupational safety and health, and job service. He discussed the fact that in 1986 the employees of the Commission decreased approximately 18% with the biggest decrease being in the Occupational Safety and Health Division. The Commission subsequently increased its workforce so that the present level is about the same as it was in 1986.

Utah above the National Accident Incident Rates: The national incident rate of accidents for Utah continues to be above national rates, which is reflected in the increased workers' comp premium costs. There may be some correlation in the drop of safety personnel at the Commission in 1988 and the increased incidence rate of accidents.

Commissioner Robert Wilcox, Insurance Department, asked if the Commission had seen any specific industry rated accident statistics to which **Commissioner Carlson** responded that there is in the construction industry. Also,there are industry comparisons for manufacturing, etc. **Steve Richins**, Utah Building Trades, commented that organized construction industry maintains a lower rate of injury - in most cases, far below the national average. It is the unorganized section of the construction industry that jumps the percentage. The organized contractor that has safety programs is paying the cost of those who do not. **Robert Wilcox** asked for statistics, which Mr. Richins said he would get for him as to these comparisons.

Electronic Data Information: An additional need the Commission has that is limited by budget restraints is the electronic data collecting information system (EDI). The gathering

of statistical information through EDI would be good information that would give the Commission the ability to compare state-to-state. Joyce Sewell stated that there are 11 states capable of using EDI. Chairman Hadley added the Commission now accepts electronic information from Workers Compensation Fund, but EDI would enable the Commission to expand to all the private carriers and self-insureds, which would then give a good solid base of information as to what is driving the system.

Ed Mayne, President of AFL-CIO, commented that there may be a correlation between the inspectors and accident rate, but we don't know this and only can guess at it unless there are people who can make the data knowledgeable to the Council. Because of the focus now of the new law on safety programs for industries with high risk rates, without that statistical data, we will never know where the problems really are.

Larry Bunkall, President of Utah Manufacturers Association, reminded the Advisory Council that six years ago it approved a .25% increase for the computer technology for the Commission. **Chairman Hadley** responded that was available for only one year and the money was used for the purchase of computers for the Commission and the programming that is in place.

3. RULE MAKING PROCEDURES

Chairman Hadley explained the procedure the Commission follows with regard to rule making:

a) Involvement of interested groups - labor and management representatives (informal process) and Commission will receive written input.
b) After input, rule may be revised or unchanged, and submitted to the Commissioners for review - objections if there are some and any revisions made as a result.
c) Copy of rule mailed to Advisory Council, which allows another opportunity for review - especially by those who may not have previously seen it.
d) Rule taken to open meeting, at which time it will be publicly passed on by the Commission, unless additional concerns are expressed and need to be addressed.
e) After open meeting, rule will be submitted to rule making process.
f) Fifteen or more people can ask for another hearing.
g) After hearing, rule is then returned to open meeting again, either revised or unchanged.
h) Rule sent to a Legislative Oversight Committee at which time they will indicate 1) Okay; 2) Agency has no legislative authority; 3) The agency must appear and justify reasons for promulgating the rule, which is another open meeting because it is a legislative process; or 4) Committee can ship rule back and say next session of Legislature, it will be abolished, or agency make changes and do what is necessary.

David Bird asked as to how Joyce Sewell gets a rule to its first interested group and the suggested the Advisory Council might be the place to do this. **Chairman Hadley** responded that the Commission can bring the Advisory Council into this first step for written input, which may eliminate possible problems early in the process.

4. IMPAIRMENT RATING SEMINARS UPDATE

Dr. Alan Colledge stated that as of this date eight (8) Protocol and Impairment Seminars have been completed. Physician attendance included a possible 400 - 500 medical providers (primarily physicians) throughout the state - Logan to St. George - as per Joyce Sewell. There were approximately 250 attorneys also attending the seminars.

Dr. Colledge noted two requests from the seminar audiences: 1) A day course sponsored by the Industrial Commission to help further educate physicians or providers as to how to do impairment ratings; 2) For the Industrial Commission to sponsor a course "dealing with difficult patients."

Commissioners to Make Appointments for Additional Protocol Committees: The Protocol Committees are still standing and receiving important input and will probably need to be reviewed again in another three months for evolution on the three items - low back pain, carpal tunnel, and knee pain. Dr. Colledge added that there is enough interest in the medical community to put together the cervical pain protocols, along with the shoulder pain protocols. The Committee is waiting for the Commissioners to make those appointments.

Outcome Analysis: Dr. Colledge stated that the "outcome analysis" tracking how Utah differs in the treatment of industrial injured patients and the return-to-work rates is being fairly well charted and contains a number of parts to review. The Committee has a number of patient charts to review. He added that it is a very labor intensive process and has to be done carefully.

Fourth Edition AMA Impairment Guide Rule: **Art Sandack** asked if the treatment process has been adopted in any formal way for carpal tunnel? He indicated he was aware there is a rule written with respect to the utilization of the Fourth AMA Impairment Guides. Joyce Sewell stated that rule was adopted March 3rd for any disability that occurs after March 3rd. Mr. Sandack asked about "entrapments" to which Dr. Colledge responded that there is a table in the Fourth Edition which deals with all upper extremity peripheral neuropathy.

Dr. College explained that protocol treatments have not been adopted at this time.

Commissioner Colon added that part of the purpose of the seminars was to take the information in these "Guidelines for Treatment" to the medical providers throughout the state to receive input from them as to whether these treatment guidelines are acceptable. There has been a lot of "feedback" and the Committee has continued to incorporate it into the protocol treatments. In the near future the Committee hopes to publish these guidelines in a final form and to adopt them as official.

Mr. Syndic asked if there are some special rules peculiar to Utah that are in force for rating entrapment syndromes. Dr. College responded that in referring to only "impairment", as the Committee reviewed the Fourth Edition, it was the Committee's impression that the pendulum had swung too far to the right - too conservative, particularly in low-back pain

other rating systems, including California and Rhode Island systems, and then the Committee devised a fairer rating system, which is in place now.

October - Impairment Rating Seminar: Dr. Colledge added that it is before the Commission that a seminar be put together in October that may be mandatory for physicians who wish to do ratings in Utah to attend.

Committee Participants: Mr. Sandack asked Dr. Colledge who the participants were on the Impairment Guidelines Committee and the Protocol Treatment Guidelines Committee, to which Dr. Colledge responded that all were physicians. Mr. Sandack stated that he had asked in his letter he had written to the Commission asking why legal and lay people were not involved in these Committees in giving input. He stated it is a significant opportunity to talk with physicians about medical reports and informing them of the role they play in documenting and making medical reports in support of a claim. He commented that he does not understand why these are such closed Committees. He added that there is an obvious interface between the law and medicine that the patient is involved in.

Topics Addressed at Seminars: Dr. Colledge responded that the eight seminars addressed a multitude of topics. Because doctors do not receive the very training Mr. Sandack just commented on, the Committee had the Commissioners speak at the seminars indicating the importance of medical reports. Also, Timothy Allen, Chief Presiding Administrative Law Judge at the Commission, was a speaker indicating the Administrative Law Judge's need to have these reports to adjudicate the difficult cases. The treatment protocols guidelines were presented and prior to discussing these, the Committee also indicated that the rules and regulations stipulate that a physician must write a report in a certain format, objective information given, and if it is not given, that the denial for the treatment rendered can then be done.

Dr. Colledge stated there was also a topic at the seminars on "ethics" of the physician - how does the physician maintain ethical standards when the patient may push him one direction and the employer the other.

Dr. Colledge also pointed out that with regards to Mr. Sandack's second issue, the Committee was primarily dealing with medical issues only and there are no time constraints.

Chairman Hadley stated that the Commission will review Mr. Sandack's concerns to see that all the representation needed on these Committees is there.

Appreciation to Committees: Chairman Hadley expressed appreciation to Dr. Colledge and his Committee members for the monumental task they have performed and added that the state of Utah has received in terms of value a great number of dollars in donated services.

Commissioner Colton added that less this effort be construed as a cost issue, the Commission views it more as a quality issue. The doctors that served on these Committees were specialists in their fields, and they surveyed a vast amount of research on what are the very best treatments available nationally. Through this survey the

Committee tried to arrive at the best treatment guidelines and to distribute them to their peers who may not be in a position to devote that much time to research and keeping abreast in the current thinking in those particular areas.

V. INTERIM LEGISLATIVE STUDY ISSUES

Brian Allred from the Office of Legislative Research and General Counsel, discussed possible items that may be scheduled in upcoming meetings of the Business, Labor, and Economic Development Committee:

1. Whether to combine the general insurance fraud statutes passed last year by Representative Yardley and workers' compensation fraud statutes that were passed two years ago by Speaker Bishop. **Robert Wilcox, Insurance Commissioner,** commented that in melding the two statutes, it should be done with an emphasis on the fact that we don't want to give up any of the strength of the existing Workers' Comp Fraud Act.

2. The Department of Employment Security statute changes such as: a definition of independent contractor.

3. The "Sullivan" issue.

IV. DISCUSSION OF ADVISORY COUNCIL LEGISLATIVE ISSUES

1. Medical Costs/Comp Rates, and
2. Hospital costs - statistics:

David Bird: Utah is 44th in rates currently - half of what it is in Colorado and California. Utah is much better in terms of amount of benefit given per employee per injury. An item the Task Force pointed out was Utah spent about 60 percent of Utah's compensation benefit dollar on medical costs, whereas nationally it is about 40 percent on every dollar going to medical vs. 35 cents, which means Utah employees are not getting the dollars - the dollars are going to medical providers, etc. These ratios suggest we are out of "whack" in Utah. He suggested one issue possibly affecting these costs would be hospital costs, which the Commission has no control over under the statute.

Ed Mayne: The Utah Medical Association and Hospital Association observations are that they are not out of line; it is the benefits being paid to the employees that are so low and if they were higher, the percentage would be more balanced. **Chairman Hadley** added that was the conclusion that John Burton came up with in the Monitor, but he is not sure that it is the case.

Lane Summerhays: The NCCI publishes daily rates and their statistics show that Utah was the highest among all of the states for daily rates charged to workers' compensation.

Dr. Colledge commented on the hospital costs or medical costs being higher than any other state in the nation and that most providers in Utah are sensitive to this. However, before the hospitals are confronted with this issue, there must be accurate statistics to support the charge. Providers are presently undergoing a significant metamorphic with "Hillary". No physician was appointed to her panel. Physicians feel very much victimized and have no say in their goods and services.

His second comment was that physicians as a whole are very much scientists and they will correct themselves if given correct information. Dr. Colledge stated he has never seen any outcome analysis or data as to how well he does as compared to other physicians, and we do know that there exists in states varying outcomes according to physician providers. In Utah, fusion rates are significantly higher and people who have disectomies are four times higher than anywhere else in the nation. When we have this information from those of you who have this outcome analysis information, the physicians and we will correct ourselves.

3. Guidelines for Treatment:

Lane Summerhays explained that the 65 percent going to medical costs was a '92 statistic. Using SB 151 and other cost-contained measurements available to us, that figure dropped to 56 percent in 1993. He added that this year, with full implementation of SB 151, it should drop again. The Advisory Council does need to focus on medical costs, and the "guideline program" that Dr. Colledge has been chairing is one of those issues. One of the good things in Utah that affects the statistics is that Utah has a labor force that is much more ethical and comes back to work much more quickly than other states.

4. Uninsured Fund:

Larry Bunkall commented that in going through the Employers' Reinsurance Fund last year and from the actuary perspective, a new problem was discovered on the horizon, which is the Uninsured Employers' Fund. He proposed that the Council come up with a solution this year that will address control of that Fund which is headed for perhaps more serious problems than the Employers' Reinsurance Fund. He added he felt controls and penalties need to be considered for the uninsured employer.

5. Collective Bargaining:

Steve Richins stated that some time back the Council discussed the very simple change in law to allow for collectively bargained workers' comp. He asked that this be brought back again.

6. Bad Faith Conduct

Art Sandack commented that in working on the collectively bargained bill last year, it brought up the question about who had jurisdiction and the suggestion coming from the Commission was that the Insurance Department was to to evaluate the financial

security of the plan. He stated that in his letter circulated at this meeting, he asked for a review of insurance practices in regulating "bad faith conduct" by carriers or somehow providing some review or control. He added that there has been legislation passed addressing fraud of behalf of employers committed by employees. The carriers themselves should be subject to controls. There was a recent decision indicating that employees are not in privy with the carriers, and so they are not subject to the traditional action of "bad faith." Mr. Syndic added that the Insurance Department has no control over the Workers Compensation Fund of Utah.

Commissioner Wilcox responded that the Insurance Department has a high level of control over the workers comp carriers, but it is a different matter as to adjudication of specific claims issues. The Department has the ability to deal with carriers who do not settle claims in good faith, which is through a formal process where fines can be levied and it can order restitution. Under the Insurance Fraud Act passed this last year, the Department was presented a bill that was essentially dealing with fraud perpetrated by policy holders against carriers. The Insurance Department expanded that bill to include insurance fraud in all its dimensions, including fraud by insurers against policy holders. Workers' compensation was left out of this because a Fraud Act was passed the previous year, and we didn't have an opportunity reconcile the two bills. The Department is dealing with this now and it will enable us to bring a criminal action against an insurer who perpetrated fraud against a policy holder.

Ed Mayne commented that we now have a year of experience in that area, and it covers not just employees, but employers, and providers. It would be interesting to review the results. If we did leave out the carriers, the bill needs to be revisited. Commissioner Wilcox added that this would be an appropriate topic when reviewing combining those two laws to bring the same authority that is over insurers generally over insurers in workers' compensation.

Joyce Sewell added a suggestion is that if the Commission addresses "bad faith", a carrier should be penalized for not making timely payments and the penalty should go to the claimant who has done without during this period.

7. Reevaluation and Requalification of PTD - Definition:

Larry Bunkall expressed his concern that a rather aggressive step was taken on the Employers' Reinsurance Fund putting full burden on the shoulders of individual employers. Because of this, there needs to be proper use of PTD's so as to avoid excessive costs in the future. **Lane Summerhays** added that there needs to be in front of reevaluation an initial definition of a perm total. **Ed Mayne** added that this leads us to more rehabilitation.

8. Employee Leasing:

Commissioner Carlson stated he supported the issue Mr. Bunkall brought up regarding the uninsured employers and that it is a major problem. He added that the Commission is by statute a "toothless tiger" in not being able to do something about

this problem. Because the Commission's legal staff is extremely limited, the Commission's ability is limited to take on the problem of compliance. There are no real penalties for the uninsured employers. The other problem tied to some of this same issue, is employee leasing, which is a problem in the making. The Commission has seen employee leasing companies which have had fatalities and no insurance. The system is not strong enough to watch this.

Ed Mayne commented he thought the Commission had been given some good oversight on employee leasing. **Lane Summerhays** commented that there are some good laws in other states to look at where an employer who was uninsured can be charged two or three times the premium - significant penalties - and then, the penalties could be used to finance the attorneys staff to go after them. **Commissioner Wilcox** commented that would be an area that could be looked at as part of the fraud statute. With not too much effort, the statute could make it a criminal action to go without workers' compensation.

9. Safety - Financial Incentive

David Bird asked about the issue of safety, if there is something that could be addressed, especially with small companies, that isn't mandated - which kills the concept - and causes employers to oppose the issue of safety training. **Lane Summerhays** added that rather than mandating employers have a safety program, the only time employers get serious is when the financial consequences are so great they have to do it.

10. 24-Hour Coverage - Improving an option for this to the employer:

Lane Summerhays commented on the suggestion of 24 hour coverage, that some states are funding some pilot projects and putting together some formal plans to see how it works - Oregon authorized a joint venture between their State Fund and Blue Cross/Blue Shield.

11. Disqualification of Drug and Alcohol Use on the Job

12. Regulation of Attorney Fees - Definition:

Art Sandack stated that he had raised a concern in the last Council meeting when the reassessing of PTD cases was raised with a draft rule as to how the attorney fee would be addressed.

VII. NCCI RANKING OF UTAH IN COMPARISON WITH OTHER STATES

Chairman Hadley stated that out of 37 states evaluated, Utah is 35th in the comparison of the average voluntary rates using countrywide payroll distributions done by NCCI. Oregon ranked only 11th, although they are not tracked by NCCI, despite all of their reform. He added that Alexander & Alexander had a study of what was a major issue of companies

for the next 5 years and workers' compensation ranked in the top 10, so when a company comes to Utah, workers' compensation has to be low enough to invite them here.

VIII. APPROVAL OF MINUTES

Ed Mayne made a motion to accept the minutes of March 31, 1994, as written and Steve Richins seconded the motion. The Council members all voted affirmative to accept the minutes.

Chairman Hadley thanked all of the Advisory Council members for their time and service and stated the that the period of time they were serving would be up as of July 1, 1994. He indicated that the Commission would be accepting applications for appointment for the new Workers' Compensation Advisory Council.

THE MEETING WAS ADJOURNED.

F:wca/mijun.94

THE INDUSTRIAL COMMISSION OF UTAH
WORKERS' COMPENSATION ADVISORY COUNCIL

Thursday, September 15, 1994, 12:00 P.M.
Room 211, Employment Security Building

The following Advisory Council members were in attendance:

Larry D. Bunkall, President, Utah Manufacturers Association
Steve Richins, Sec/Treasurer, Utah Building & Construction Trades Association
Eddie P. Mayne, President, Utah State AFL-CIO
David Bird, Esq.
L. Craig Miller, Kennecott Corporation
Pat S. Drawe, Sr. Attorney, Questar Corporation
Jack McQuivey, United Steelworkers of America
T. Jeffrey Cottle, Esq.
Virginius Dabney, Esq.
Lane A. Summerhays, CEO, Workers Compensation Fund of Utah
Vanna Hunter, Insurance Department (for Robert E. Wilcox, Commissioner)

Advisory Council members excused:

Richard J. Thorn, Executive Director, Associated General Contractors of America
David G. Peay, Great American Insurance
Dr. Richard E. Johns. Jr., Hercules

Legislative Liaison absent:

Representative Gerry A. Adair

Others Present:

Stephen M. Hadley, Chairman
Thomas R. Carlson, Commissioner
Colleen S. Colton, Commissioner
Joyce A. Sewell, Director, Industrial Accidents
Erie V. Boorman, Administrator, Employers' Reinsurance Fund
Roger Pusey, Deseret News
Marina O'Neil, Standard Examiner
Dr. Alan Colledge
Sue Kooring, First Medical Regional Office
Recording Secretary: Patricia Ashby

WELCOME BY CHAIRMAN STEPHEN M. HADLEY

Chairman Stephen M. Hadley officially brought the meeting to order and explained the provisions of open meeting Utah law which the Commission has met.

Chairman Hadley introduced the new members of the Advisory Council and welcomed them into the Council.

1. APPROVAL OF MINUTES OF JUNE 23, 1994

MOTION: Chairman Hadley asked for an approval of the minutes even though some of the new members had not participated in the meeting of June 23, 1994. Lane Summerhays moved that the minutes be adopted as written. Craig Miller seconded the motion. The ~~voting was unanimous~~ motion was passed.

2. FUTURE ADVISORY COUNCIL MEETINGS

Chairman Hadley distributed a proposed schedule of Advisory Council future meetings for discussion by the Council. It was determined that the next meeting will be held on October 20, 1994, tentatively with the additional meetings held on November 10, 1994, December 15, January 5, 1995, April 20, 1995, May 18, 1995, and June 15, 1995.

.3. REFERRAL OF MEDICAL ISSUES TO MEDICAL CONSULTANT

Chairman Hadley stated this issue addresses the Commission's hiring of a medical consultant. The statute has some language indicating referral to a medical consultant can be done only on stipulation of the parties referred to the medical consultant. The Commission would like to put the medical consultant in the same context as medical panels.

Two Issues to be Overseen by the Medical Consultant to the Commission: **Joyce Sewell, Director of Industrial Accidents,** explained further there are two main tasks for physician input: 1) Dr. Alan Colledge has been retained by the Commission as the medical administrative consultant overseeing such areas as protocol or treatment guidelines, RVS Schedule, impairment ratings, and training seminars. 2) The other portion of responsibility to be addressed by a medical consultant is performing medical examinations and writing medical reports or arranging for other physicians to perform these in disputed cases before the Adjudicative Law Judge. This will replace the present medical panel on which it has been difficult to get physicians to serve. The Commission does not have a medical consultant retained at this time to deal with this issue.

Dr. Alan Colledge discussed some of the latest issues confronting the protocol treatment committees such as fusions which are used more frequently in the West than on the East coast, and that they are seeing an increase in claims involving arms and shoulders and, therefore, have asked Dr. Ed Weeks to chair a committee to review protocols for these injuries.

Pending Impairment Rating Seminars: Dr. Colledge stated they have also formulated a committee with Dr. Johns, Dr. Barbuto, and himself to put together an impairment seminar scheduled to be held November 3*, 1994, [*this meeting time has been changed to November 16th] from 9:00 a.m. until 4:00 p.m., at the downtown Hilton, which will be a six-hour course. There will be no certification for it and will be open to practicing clinicians, including chiropractors. The Committee would like this seminar to be for physicians only, with another course sponsored in possibly February or March for adjudicators, attorneys, and other medical providers.

Virginius Dabney indicated that the Injured Workers Association would be having another impairment rating course in the first week of January, 1995.

Pending Rules: Joyce and Dr. Colledge will be reviewing rules that are in place, or need to be in written, as to medical examinations (how many and who will perform them), authorization for surgery

- the possibility of a standard form, a standard form to be used by physical therapists and chiropractors relating to visits to be submitted to carriers, etc. **For the October meeting Dr. Colledge and Joyce Sewell may have a rule on medical referral for the Council.**

Possible Statutory Change for Medical Examinations: There was some discussion as to the necessity of a statutory change to accommodate the Commission's referral for a medical exam to its medical consultant rather than using the present medical panel. Joyce Sewell pointed out that presently the statute states the parties would have to agree on the medical exam. She also stated that the statute refers to "impartial medical evaluations" to be done by a medical panel or by a medical consultant or director. Therefore, these are the only "true" IME, as the term is used. All other medical examinations done by either party are simply just that - medical exams.

Delays in Hearings Requiring Medical Examinations: **Commissioner Colleen Colton** commented that a serious problem the Commission is seeing is delays in adjudication (with its streamlined hearing procedures) while waiting for a medical panel report, because of the limited pool of doctors who will serve on a medical panel. Sometimes the Commission has experienced two to three month delays for a hearing that is waiting for a medical panel report. Commissioner Colton said that one of the approaches to this issue is to have the medical consultant hired by the Commission to review those cases in which the physician has an area of expertise. Those cases that the medical consultant does not have expertise in would be referred to another specialized physician. **This process is hindered by the statement in the statute which requires that all parties must agree to the use of having a medical consultant employed by the Commission.**

There was some discussion on this issue and Joyce Sewell indicated that there is a time period in which either party can object to the medical panel's report. That portion of the statute would still be in there.

Discussion regarding the Medical Consultant:

Ed Mayne, President of the AFL-CIO, asked what experience is there in other states as to the use of medical panels or medical consultants? **Joyce Sewell** responded that just from knowing many other administrators in other states, most states retain a medical director where cases are sent which have medical issues that need to be resolved. If the medical director cannot handle the case, the medical director then has a link to the medical community to find a physician that has the needed expertise.

Ed Mayne then asked if there is a holdup in resolving cases requiring medical review because of the problem in the limited number of doctors willing to serve on the medical panel, are there permanent panels in other states?

Chairman Hadley indicated that there are, but none of these panels are comparable to what Utah has. Utah was a pioneer in this panel concept. Otto Wiesley, a former Utah Industrial Commissioner, established this panel system. Some of the states that tried it did not have the same success that Utah did.

Jeff Cottle remarked that one thing that would be required to successfully implement a Medical Director is support and trust in his ability to perform medical exams.

Joyce Sewell added that there are not a lot of physicians to draw from. Most practicing physicians

do not want to be bothered with this. It is not a highly desired task, they do not get paid much, they are patient oriented, do not want to lose anyone in their practice, and they may have to testify in court.

Commissioner Colton commented that the Medical Director presently will be part time, because of finances. Chairman Hadley added that the qualifications for the Director were put out in a job description which does not include a specialty, but it does include what this physician will be required to do. The physician should have had some exposure to the workers' compensation system. An orthopedic specialty would be the first priority because of high numbers of cases that involve orthopedic problems.

Dr. Colledge commented that it is important to realize when soliciting someone for this position, that you are looking for a very unique individual and there are not a lot of physicians in the field who are in need of work. The letter that was sent out from the Commission to all practicing physicians that this position is now open received four responses. The response will probably come from physicians who do not have overhead in their practices - office costs. The requirement that the physician have a lot of experience - also a third qualification that the physician be neutral - make it a difficult position to fill.

Commissioner Colton stated that one of the problems is the legislature has appropriated what the Commission can pay for this position which is $72,000 and includes benefits - that is for half-time. Also, the kind of work which will require reviewing patient records a lot of the time rather than seeing patients much of the time. She added the practical realities are that currently the Commission's medical panel is limited to three or four in the state anyway.

Jeff Cottle stated that the Social Security Administration always have a medical expert available. Many of them are retired from the University of Utah.

4. COMMISSION ASSESSED PENALTIES

Penalties for Uninsured Employers - Statute Change:

Joyce Sewell discussed a handout [Attachment "A"], the first page of which is to give a scope of the problem the Commission currently has with the uninsured employers in Utah which is a fairly large number, possibly 15%. But the Commission has no way of knowing how many employers are out there that may be without workers' compensation coverage. The Commission opens about 5,000 investigations a year. Of the number, 33% are repeat offenders. Of twelve cases referred to the Legal Division for court action a few days ago, only three were first time offenders - six were into their third offense, one into fourth offense- of not carrying coverage. The current language in the statute does not allow the Commission to go back on any time period when the employer was not covered and collect penalties. Therefore, if the Legal Division gets the uncovered employer into court and the employer shows up in court with insurance in hand, even if the employer has had no insurance for periods of five months or longer, the employer pays no penalty.

Joyce Sewell referenced the second page of the handout which is a proposed draft of §35-1-46.10, "Notice of noncompliance to employer - Enforcement power of commission - penalty." The money collected from these uninsured employers as a result of this bill would go to the Uninsured Employers' Fund (UEF) to defray costs. Joyce added there is some language in the draft that

"corporate" officers could become personally liable for the penalties or the injuries.

Uninsured Employers' Fund Process: Joyce Sewell explained the UEF process. She explained that the Commission has hired a field investigator, Larry Williams, who wears a Commission badge. He is a former police officer and has had police investigative training. He investigates whether the employer is still in business, has employees, and whether the injured person is an independent contractor, hired by an employee leasing company, or a true employee (this issue is very common). Joyce stated the Commission has had a lot of trouble with employers not carrying coverage in St. George. The next procedure is to send out certified letters to uninsured employers. After the referral to the legal process of those who did not respond with certificates of insurance to the letters or proof of not doing business anymore, the court issues a temporary restraining order against the uninsured employer to prevent them doing business. If they continue, then it is a criminal offense.

Discussion about Penalty Amounts in Proposed Bill: The penalties recommended in the proposed bill were insufficient to prevent uninsured employers from continuing to abuse the system by not having coverage. Lane Summerhays suggested a $520 penalty for non-payment of a $30,000 premium is not enough incentive. He felt the penalty should be two or three times the premium amount.

Commissioner Colton commented that the majority of these offenders are small businesses with a variable number of employees. **Lane Summerhays** stated that most are probably small construction companies that would not pay the premium, as the suggested penalties are not punitive enough. He suggested an audit of their payrolls would not be too difficult to perform in determining a penalty.

Commissioner Colton stated that the language in the proposed draft of a bill was taken from other states (in this case New York). She indicated that in selecting assessed penalties, the Commission is trying to avoid adjudication protesting the penalty. This way it would be very definitive.

Joyce Sewell stated she had 40 states respond to a request she sent out asking for information on this issue (attached to handout). She suggested the Committee working on this proposed bill may want to structure it differently so that there is, in fact, something in a greater amount in penalties. The language in the proposed bill would allow the Commission to quickly issue an Order and, also, the uninsured employer would have a right to contest it.

Steve Richins commented that this lack of coverage could be construed as "fraud." With some of these small construction firms, it would be difficult to do an audit, because they misclassify employees, etc. He said he would like to see the suggested audit left out and just a flat penalty in the proposed bill.

Chairman Hadley stated that Mr. Richins raised a good question as to whether this is fraud. It is quite possible this could be prosecuted under the fraud statute, but there are provisions the Commission is reviewing within the workers' compensation code for uninsured employers that specifically allows the Commission to prosecute a criminal action.

Robert Wilcox Committee - Penalties and Enforcement of Uninsured Employers:

Chairman Hadley stated he would like to refer this proposed bill to the Wilcox Committee. He also suggested the Committee might want to look at any combinations of the "fraud" statute, §35-1-108 or

109 and how it would interact under §35-1-46 and 46.10, 46.20, and 46.30, which sections the Commission has been reviewing for enforcement of uninsured entities.

The other issue to look at is "how is the penalty enforced once it is issued" and "whether or not the Commission can proceed to have that enforcement mechanism or whether the case would have to be referred over to the court for further action." Under the current section of the Code, the Commission can prosecute in the name of the state on the civil matter and can issue the penalty, determine the penalty, issue a Commission Order, and have the court issue a subsequent Order. **The Commission is looking for some mechanism that allows the Commission to issue the Order, take the Abstract over and docket it, and execute on the docketing matter.** The Committee would need to look at those three sections to determine how this will occur - giving the Commission the authority to issue the penalty and the authority to follow through and make sure it is collected once it is issued..

Larry Bunkall asked if there is any trend (statistics for previous years) that would give the Council input as to the totals of applicants in previous years because of uninsured employers in UEF as per what the present total is? **Joyce Sewell** responded that the total number of cases is down in UEF. The Commission has become more aggressive with the uninsured employer in garnishing wages or taking assets such as property and cars to cover the costs of the injured workers of uninsured employers. However, Joyce pointed out that the cases the UEF is getting are those with more serious injuries that are very costly, such as small trucking company injuries and restaurant injuries. **Larry Bunkall** asked about the trend on investigations opened? Ms. Sewell responded that has stayed fairly steady over the years. **Commissioner Colton** added that this was limited by the staff until the Commission hired the field investigator this year.

Commissioner Colton suggested she would like to see a range of penalties in the bill, as there are some employers who inadvertently let a policy lapse from poor bookkeeping, etc. whereas there are willful violations that require a different degree of penalty.

David Bird commented that the assessment of administrative penalties across the board has always been a very touchy issue for the Legislature from both sides.

Ed Mayne commented he felt the Legislature will be more receptive to this issue, because of who the burden will be put upon. The only concern here is that the proposed penalties are not stiff enough and only provide incentive to pay the fines and not worry about obtaining the coverage. This is not acceptable and something must be done.

Lane Summerhays suggested this Committee ought to also take a hard look the provision of the proposed bill - No. 8 - which really pierces the corporate veil and stated that it will take legislation to bring that issue in as well. **Chairman Hadley** commented that it is interesting that this is already in the Code - §35-1-46.30 - "any employer who fails to comply and every officer of a corporation or association which fails to comply with the provisions of Section 35-1-46 is guilty of a Class B misdemeanor." **Chairman Hadley referred this to the Committee also for review.**

Joyce Sewell stated there are situations occasionally of claims against a supposed uninsured employer where the issue of coverage is raised - their check went to the carrier, but the policy was not issued until several days later, and during this time period the injury occurred. The Commission judges cannot rule on that coverage issue, in that carriers bring up the fact that it is contract, and not administrative, and the carrier declares them basically uninsured. Because of this, the employer

would have to take the carrier to a district court to prove coverage. **Most states allow the Administrative Law Judge to rule on issues of coverage when a claim is involved. She asked that the Committee to look at that issue also.**

Chairman Hadley gave some guidelines to be accomplished by the Committees who are assigned topics for review and to make recommendations: **(1)** A deadline - do what you can by the next meeting, but no later than November 10th, to have something in place that the Commission can submit for a pre-filed bill; **(2)** Notices of the meetings of the subcommittees should go to the entire Council and the Commission, so if anyone wishing to attend may do so, with the idea in mind that it is the Committee's meeting - the others can give some input. Also, the Committee could invite individuals to the meetings that might have some special expertise on the issues, but they are not to be considered Committee members. The recommendations will be brought back to the Council to be passed or rejected, with the idea in mind that the Council is an advisory capacity to the Commission.

5. INJURY PREVENTION - FINANCIAL INCENTIVES

Lane Summerhays commented they have seen a decline in accidents in the last two years. As top management gets involved in safety and adopts safety programs, employers can eliminate accidents. The attitude of many employers is that accidents happen, and they make no effort to adopt or put into effect a safety program. In §35-1-108, there is a penalty that states, "if an employer does not have a safety program, the employer can be assessed an additional 5 percent premium." **That is not enough penalty to cause an employer to take a look at their safety efforts. The Fund suggests looking at the Code to change the financial incentive from 5% up to 25%.**

Pat Drawe commented that she would assume the employer's premiums would be lower if they reduce payout on workers' comp injuries. She asked if this is too delayed or insignificant an amount. Lane Summerhays responded that presently the premium is calculated on a three-year base and is a delayed incentive. The provision he was suggesting for change would immediately give the employer a credit or penalty for what is being done toward improving safety procedures.

Jinx Dabney mentioned that one of the major topics of the Governor's Task Force was safety in the workplace. There were four recommendations with considerable documentation by the Task Force that a Committee reviewing this issue might want to examine.

<u>Lane Summerhays Committee - Safety in the Workplace Incentives</u>:

Chairman Hadley referred the "safety in the workplace issue" to Lane Summerhays' Committee and asked that the Committee have something prepared by the next meeting.

Commissioner Carlson commented this issue is tied to the previous issue of uninsured employers. He suggested incentive structure that will encourage people to be insured instead of uninsured. **Lane Summerhays** responded that right now the motivation is that it is easier to be uninsured, because there is no penalty; all that is necessary is take the Certificate of Insurance to the court and show the judge that the company is now insured and nothing happens to the employer.

6. REEVALUATION OF PERMANENT TOTALS

Joyce Sewell stated there needs to be a mechanism put in place to reevaluate injured workers coming

on to permanent total payrolls. Possibly some kind of standardized annual form with specific questions that carriers would send out annually to be filled out by injured workers on perm total which, when reviewed, might trigger a reason to reevaluate the perm total status - such as a younger person that might possibly now be eligible for retraining, or may have gone back to work after they were determined perm total before 1988, whereas an older person with a back injury would probably stay on perm total. There needs to be some kind of guideline rules.

Erie Boorman, Administrator of Employers' Reinsurance Fund (ERF), commented that the Commission presently does not make an effort to investigate or look into perm total resulting from injuries prior to July 1, 1988, as we believe the Commission may not have the authority to do so. The authority to terminate payments after the first 312 weeks for those who perhaps are working full time, or who are qualified to work full time, was granted by the 1988 statute. Since then until the present, the Commission has not had any cases that would affect the ERF with the exception of a couple that are coming on now. ERF does request statements from perm totals that they are still disabled and request information as to their earnings and this is done on a regular yearly basis.

Social Security Method of Reevaluating Disabled Individuals: There was a discussion as to how Social Security implements reevaluation . **Jeff Cottle** stated that with Social Security, depending on the seriousness of the disability, the judge or examining person, puts a disabled individual on a one year, three year, or five year review. He added that most of the disabled receive a two page letter requesting certain information as to whether they have worked, who is your treating physician, when was your last visit, etc. which they have to sign. From that document, an examiner makes a determination whether they need another medical examination and grant disability for another period of time.

Chairman Hadley suggested that the Industrial Commission could put perm total cases on a program upfront, so that when the determination is made of permanent disability, they are scheduled in their file to be brought up at a certain date for review.

Dr. Richard Johns Committee Assignment - Reevaluation of Permanent Totals:

Chairman Hadley stated he would like to give this issue to Dr. John's Committee. We would like to have something for the next Advisory Council meeting on October 20th.

Erie Boorman discussed some additional facts for the ERF and stated that in about 1989, the Commission's permanent totals were $4,400,000 (about 50% of total disbursements), 1994 permanent totals were $ 13,250,000 and amounted to 84% of total disbursements - a reflection of the seriousness of the permanent disability issue. Mr. Boorman distributed a handout with this information.

7. INDEPENDENT CONTRACTORS

Chairman Hadley stated that Job Service has created a bill that will be discussed as far as unemployment is concerned at the next Interim Committee meeting which will be held on September 21, 1994, at the Business, Labor, and Economic meeting. He explained the bill will change the test for an "independent contractor" determination from what has been named the "20 Questions of the Internal Revenue System" to the "A&B" test. This change eliminates most of the common-law factors and the IRS guidelines factors and condense it down into a very small two-pronged test. The

first test of the "A-B" test in Job Service is to be "independently established" and the second test, if they are not determined independently established, is the "control" test. The independently established test basically requires that the contractor must show he/she has a contractor's license, have filed Internal Revenue 1099, have advertised, and have a different location for employment. This criteria is more objective than the subjective tests of control, right to hire and fire, right to inspect, etc.

Chairman Hadley said that what is being attempted in the workers' compensation field is to make the test for an independent contractor the same for both Job Service and workers' compensation so that the business community will have a better understanding of what the tests are and the independent contractor won't have to deal with different interpretation from one state agency to another.

He indicated that there are different groups reviewing the possibility of a registry for independent contractors..

David Bird commented that he has observed an opposition by legislators who are also contractors to not approve anything recommended or suggested as to the independent contractor status. He added that the contractors now seem to be more willing to discuss a registry to prevent the problems that have occurred in the past. If this is so, it would be a good time to make a "registry" a part of the legislation. He also stated that any definition of independent contractor is going to result in a lot of litigation.

Chairman Hadley indicated that there is not necessarily a unanimous acceptance of the registry concept within the Commission.

8. OTHER CONCERNS

Jeff Cottle asked about his Committee's assignment chaired by David Peay. **Chairman Hadley** responded that Committee has not been given one as of yet.

Jinx Dabney commented that Dennis Lloyd presented some form of legislation or rule with regards to "permanent total reevaluations" at a former Advisory Council meeting. He suggested that perhaps that might be a draft that could be reviewed and worked on.

THE MEETING WAS ADJOURNED. **THE NEXT MEETING WILL BE THURSDAY, OCTOBER 20, 1994.**

F:wca/wcminsept.94

THE INDUSTRIAL COMMISSION OF UTAH
WORKERS' COMPENSATION ADVISORY COUNCIL

Wednesday, November 30, 1994, 12:00 P.M.
Room 319, Heber Wells Building
160 East 300 South
Salt Lake City, UT 84111

The following Advisory Council members were in attendance:

Larry D. Bunkall, President, Utah Manufacturers Association
Steve Richins, Sec/Treasurer, Utah Building & Construction Trades Association
Eddie P. Mayne, President, Utah State AFL-CIO
David Bird, Esq.
Dr. Richard E. Johns, Jr., Hercules
L. Craig Miller, Kennecott Corporation
Pat S. Drawe, Sr. Attorney, Questar Corporation
Jack S. McQuivey, United Steelworkers of America
T. Jeffrey Cottle, Esq.
Virginius Dabney, Esq.
Lane A. Summerhays, CEO, Workers Compensation Fund of Utah
Robert E. Wilcox, Commissioner, Utah Insurance Department

Advisory Council members excused:

Richard J. Thorn, Executive Director, Associated General Contractors of America
David G. Peay, Great American Insurance

Legislative Liaison present:

Representative Gerry A. Adair

Others Present:

Stephen M. Hadley, Chairman, Industrial Commission of Utah
Thomas R. Carlson, Commissioner, Industrial Commission of Utah
Colleen S. Colton, Commissioner, Industrial Commission of Utah
Joyce A. Sewell, Director, Industrial Accidents Division, Industrial Commission of Utah
Erie V. Boorman, Administrator, Employers' Reinsurance Fund, Industrial Commission of Utah
Alan L. Hennebold, General Counsel, Industrial Commission of Utah
Roger Pusey, Deseret News
Charles Doane, Intermountain Health Care
Dave Cessel, Utah Hospital Association
Roger Nielsen, Home Builders Association
Gwen Chiran, Great American Insurance
Lillian Garrett, Utah Trial Lawyers Association
Leon Lamoreaux, Intermountain Health Care
Pat O'Connor, Injured Worker's Association
G. J. Causi, Injured Worker's Association
Paul Rogers, Lobbyist, Workers Compensation Fund of Utah
Byron Clawson, Utah Hospital Association
Brent Koplin, Cottonwood Insurance
Tas Biesinger, Home Builders Association

Dawn Atkin, Esq.
Emile Kurtz
Val Bateman, Utah Manufacturers Association
Brian Kelm, Esq.
Ric Campbell
Sue Kooring, Health Trust
Robert Bergman, Utah Mechanical Contractors Association
Lori Bergman, MSS
David McConkie, Esq.
John Wray, Home Builders Association
Darrel Bostwick, Home Builders Association
Recorder: Robyn Barkdull

WELCOME BY CHAIRMAN STEPHEN M. HADLEY

Chairman Stephen M. Hadley officially brought the meeting to order at 12:10 p.m. and explained the Commission had met the provisions of The Utah Open Meeting Law.

Commissioner Hadley expressed an urgency that the committee act upon proposals by sub-committees regarding legislation for the upcoming session. He reminded committee members that proposed legislation was due by December 1, and even though some bills may need to be further refined, any bill submitted by the Committee would need to be fairly well outlined with general subject matter, sponsors and numbers.

1. CONTINUED ACTIVITY AND FINALIZATION OF SUB-COMMITTEES REPORTS

Reevaluation of Perm Totals

Dr. Richard E. Johns stated the charge of their sub-committee was to evaluate and recommend possible PTD definition and reevaluation criteria. He reported that they had met and reviewed the proposed PTD definition language as suggested by the WCF of Utah. He told Council members labor and management differences were very obvious in their meetings. They felt as a committee the legal basis for understanding the proposed language went well beyond their individual or collective expertise, and with the exception of Pat Drawe, the committee did not have the legal expertise to address all of the fine points of the law embodied in the proposed changes. They arrived at three options for the council to consider on the issue:

1. DO NOTHING: This option would retain the existing PTD language found in 35-1-67 allowing the WCA to study the issue during the interim and review the input from all sources, giving them a chance to further explore the issue. No bill would be submitted to the 1995 legislature.

2. CREATE A LEGAL TASK FORCE: This task force would fairly represent both labor and management sides of the issue. The sub-committee suggested Jinx Dabney, Ed Havas, Dennis Lloyd and Lisa Michelle Church be invited as members of that task force, along with any other individuals the Commission deemed appropriate.

3. COMPROMISE PROPOSAL: The subcommittee unanimously felt that the "clear and convincing evidence" standard of the proposed language was unnecessarily restrictive and recommended that the committee return to the current language, the "preponderance of evidence" standard of the current

law.

The sub-committee unanimously recommended that a combination of options #2 and #3 be adopted by the Council. The compromise language suggested in option #3, including the "preponderance of evidence" standard, could be submitted to meet the December 1st legislative deadline. It would become the introduced bill, be given a name and title, and stand while the legal task force could be created and have a chance to meet and attempt language for a more acceptable compromise.

MOTION: **Mr. Richins** moved that the committee adopt options #2 and #3 expressing confidence that the individuals suggested for the legal task force could come up with language that would be acceptable to both sides of this issue. **Mr. Bird seconded** the motion.

Discussion to the motion:

Mr. Summerhays asked if Mr. Dabney would explain what the objections were with the language of "clear and convincing evidence". **Mr. Dabney** told committee members the employee side of the equation felt that language was so restrictive it would be almost impossible to have a PTD case.

Mr. Mayne expressed concern over the committee's proposed compromise on the PTD definition. He felt it made a sham of the 1994 legislative action taken on the Employers' Reinsurance Fund. Now the committee is looking at changing the rules of the game to redefine PTD issues. He felt like many who supported the legislative action in good faith were misled by this kind of approach. He added that the committee should take a "wait and see" attitude, allowing more time for the results of the ERF action to take affect. He reminded the committee that the bill had only become effective July 1 and as of yet there had not been a case even come through.

SUBSTITUTE MOTION: **Mr. Mayne** moved that the committee adopt option #2 and file a title of Definition of Permanent and Total Disability enabling the Commission to have a title on hand and meet the legislative deadline. **Mr. Dabney** seconded the motion.

Discussion to the motion:

Mr. Bunkall told committee members he believed the ERF change passed by the 1994 Legislature dealing with the issue of unfunded liability was a positive thing, encouraged by the Leavitt Administration, The Industrial Commission of Utah, Management, Workers Compensation Fund and Labor. It will encourage employers to have a safer workplace and do their part to keep costs relating to Permanent Total Disability at a more reasonable level.

Further discussion ensued between the committee members relating to the elimination of ERF and the results seen thus far and those expected in cost savings as well as workplace safety.

VOTE: The substitute motion was passed with a vote of five to four.

Penalties for Uninsured Employers

MOTION: **Mr. Bunkall** moved that the committee approve 35-1-46.1 with the exception that subsection 8 be deleted. **Ms. Drawe** seconded the motion.

Amendment to the motion:

Mr. Dabney expressed concern about the wording in subsection 7 and stated he did not think "After a penalty order has been issued and review, if any, obtained under subsection 6 above, the commission may file an abstract...." was not as clear as "when an order becomes final".

Mr. Bird suggested deleting the words "has been issued and review, if any obtained under subsection 6 above" and inserting, following the word "order", "has become final".

Commissioner Carlson suggested deleting the words "has been issued and review, if any obtained under subsection 6 above" and inserting, following the word "order", "has been issued and becomes final".

Mr. Bunkall accepted the amendment to the language in subsection 7 as part of his original motion. He further stated that the Utah Manufacturers Association will oppose the bill if subsection 8 remains in the bill. He assured committee members that the issue addressed in subsection 8 will be dealt with either through the fraud section, or through substitute language for subsection 8. The UMA feels this language does not properly address the issue.

Mr. Mayne expressed support of the motion if the UMA, in good faith, would work to propose an acceptable alternative for subsection 8. He called for the question on the Motion.

VOTE: The motion was passed unanimously.

Injury Prevention - Safety

Mr. Summerhays stated the subcommittee was proposing in the document that the word "Willful" be deleted wherever found and the word "knowing" be inserted in lieu thereof.

Mr. Bunkall emphasized that the UMA would oppose the bill if the language was changed to "knowing" and wanted to stay with the original language of "willful".

Mr. Lloyd explained that the word "knowing" was a lower standard for employees and employers and would be more reasonable.

MOTION: **Mr. Bird** moved that the committee eliminate the word "knowing" in the document and return to the original language of "Willful" wherever used. **Mr. Bunkall** seconded the motion.

SUBSTITUTE MOTION: **Mr. Mayne** moved that the new language, "knowing" be retained in the proposed document. **Mr. Dabney** seconded the motion. The motion was passed by a vote of five to four.

Mr. Summerhays presented the next item which was a premium assessment credit of up to $200,000 for one half of any qualified expenditures for advertising campaigns promoting workplace safety. Discussion

ensued on the issue of the amount of $200,000.

Mr. Wilcox expressed concern that the amount was too high and suggested that the $200,000 be limited to 10% of the total premium tax up to the lesser of $200,000 or 10%.

MOTION: Mr. Bunkall moved to delete 35-1-12.1 and renumber the language which follow, currently numbered 35-1-12.2, subsections 1, 2, 3 and 4. **Mr. Mayne** seconded the motion. The motion was passed unanimously.

Mr. Summerhays continued discussion on Safety in the Workplace and explained the new language in 35-1-13, subsection (1) was an exclusion of benefits when drugs or alcohol were the cause of the accident and the standard is "clear and convincing evidence". He further added this would only come into play in the most extreme of cases.

MOTION: Mr. Bird moved that the committee adopt the Safety in the Workplace proposed bill as amended. **Mr. Richins** seconded the motion. The motion was passed unanimously.

Independent Contractor Registry

Mr. Lloyd explained the provisions of the Independent Contractor Registry draft. He stated there were two ideas being proposed by the sub-committee. The first is for the Commission to establish a registry of partners in partnerships and sole proprietors who deem themselves independent contractors and elect not to be subject to Workers Compensation benefits. The second is the repealing of the sole proprietor and partnership exclusions.

Mr. Wilcox pointed out that the numbering of the sections is "off" and should be corrected in the final draft.

MOTION: **Mr. Dabney** moved that the two bills be studied further by a committee before submitting them to the legislature for consideration.

Discussion to the motion:

Mr. Robert Bergman, representing sub-contractors told the Council they felt there were some good steps contained in the proposal, but further consideration and study was necessary before they could support the proposed legislation.

Mr. Darrell Boston, representing general contractors spoke in favor of the independent registry and felt it would help define and solve the independent contractor issue.

Commissioner Colton spoke in favor of the independent registry and explained it provided a great deal of protection for employers, employees and independent contractors by determining and declaring their status. She added this will prevent individuals who declare themselves to be independent contractors and meet a predetermined criteria from giving up workers' compensation rights unknowingly.

Commissioner Carlson spoke against an independent contractor registry and provided some examples explaining his position.

SUBSTITUTE MOTION: **Mr. Bird** moved that the committee support both bills and submit them to the legislature with the agreement that further discussion between subcontractors and general contractors would ensue. **Mr. Richins** seconded the motion. The motion was passed with a vote of five to two.

Mr. Wilcox was instructed to meet with both sides and work out an agreeable compromise.

2. DAVID PEAY SUB-COMMITTEE REPORT

Mr. Cottle presented the information in the sub-committee's report in Mr. Peay's absence. He summarized their recommendation which would amend sections 35-1-97 and 35-2-103 to include that all businesses, and/or, companies attending injured employees shall comply with the rules including any schedules, fees, charges, cost and/or expenses for their services adopted by the Commission. This proposal would give the Commission the authority to regulate all medical providers that attend injured workers.

MOTION: **Mr. Dabney** moved that the committee adopt the sub-committee's recommendation. **Mr. Richins** seconded the motion.

Discussion to the motion:

Mr. Dave Cessel, Utah Hospital Association, expressed their concerns to Council members explaining they felt this action was jumping the gun. He outlined four areas of concern in a handout distributed to the committee (see Exhibit A).

Mr. Summerhays expressed his concern about medical and hospital costs. He stated SB 151, passed in 1993, allowed for a private industry solution to assist in controlling costs through PPOs and he would be opposed to taking any action which would prohibit a carrier or self-funded provider's ability to direct patients to a PPO. He felt putting price mechanisms in place did not control the ultimate cost. It controls only the price, not the utilization.

Joyce Sewell, Industrial Accidents Director, Industrial Commission of Utah, expressed her concern over the large difference in outpatient rates compared to services performed in the hospital. She felt this would provide a means to better balance out those costs.

Mr. Bunkall stated physicians should be included in the RVS no matter if their services were provided in a private clinic, outpatient facility, or hospital.

VOTE: The motion was passed with **Mr. Bunkall** voting in opposition of the motion.

3. OTHER MATTERS

Chairman Hadley presented proposed legislation amending Section 35-1-77 relating to the medical director or medical consultants to the Commission. Committee members expressed concern there had not been enough time for sufficient study of this proposal and chose to take no action.

4. APPROVAL OF MINUTES OF NOVEMBER 19, 1994

MOTION: **Mr. Richins** moved to approve the minutes of the Workers' Compensation Advisory Council meeting, November 10, 1994. **Ms. Drawe** seconded the motion. The motion was passed unanimously.

Ms. Sewell distributed proposed Reemployment Rules which will be presented at the Open Meeting, December 7, 1994. She asked that committee members review the changes and inform her of any concerns or comments prior to the Open Meeting.

Chairman Hadley announced the next meeting of the Workers' Compensation Advisory Council would be Thursday, December 15, 1994, at 12:00 noon.

The meeting adjourned at 2:35 p.m.

Senate Business Labor & Economic Development
Standing Committee
February 17, 1995

Discussion of SB124

Senator Buhler presented the bill.

Buhler: Actually this is, of all of the ones on workers compensation, this is one that I think will not be the most difficult, certainly. As you are probably aware, and I will try to be rather succinct because I know we do have a lot on the agenda and there maybe some questions, all employers are required to carry workers compensation insurance and while the Industrial Commission works hard to try and make sure that everybody is in compliance with this, we have continually about 10% of our employers who do not have coverage. And the problem is, as determined by a number of people who looked into this, that too often it is less expensive for an employer to not have insurance, to get caught, to get insurance and then drop their insurance than it is to just carry the insurance and be a good citizen like they should be. So, the, of course, when they are not insured then everybody has to pick up the burden, when the worker is injured then they are covered by the uninsured , what is it called, uninsured employers fund, I'm sorry I couldn't remember what that was titled. Which is supported by all the employers through a tax on their premiums. Here are the provisions of Senate Bill 124 which are meant to address this. It imposes a penalty that consists of the greater of $2,500 fine or 3 times the amount of the premium employers would have paid for the workers compensation insurance coverage, the penalty may be assessed by the Industrial Commission. The penalty calculation is based on the rate filing of the workers compensation fund using the highest rated employee class code applicable to the employers operation as well as the payroll basis of 150% of the state's average weekly wage and a maximum of 156 weeks [inaudible] applied so there is a cap. The intent is not to drive somebody out of business but it is to have some pretty stiff penalties so that if you're not carrying coverage you're going to face a penalty. There is an adjudication process by the, under the Industrial Commission after a penalty order has been issued and becomes final the Commission may seek to collect the penalty through District courts amounts collected are deposited for the benefit of the uninsured employers fund. I'd be happy to take questions.....

Discussion concerning the amount of the penalty and the calculation of the penalty.

Buhler: I think you also have to recognize who you'll be dealing with in enforcing this kind of a statute. You're going to have people who are trying to evade the law, and it's a well known thing that you have to have workers compensation coverage and it's not beyond the realm of possibility that they will try to falsify how much the wage is this person is to be paid in order to get that premium down, for that

penalty.

Question by the Committee: I just want to ask one more question. Who, what group of businesses, or who are the people that are not complying now, is there a way to, are they the very very small start up companies, or what businesses?

Buhler: Let me turn to a representative for the Industrial Commission, Joyce, I'll have her identify herself.

Joyce Sewell: My name is Joyce Sewell, and I am the director of the Industrial Accidents Division that handles the compliance for the employers in the state. The majority of the employers we're talking about run the gamut. But we're talking mainly about the construction industry, restaurant business, usually they are the small employers, less than 5 to 10 employees and we go after them, it takes us awhile to catch them, and then they'll take out a policy for a quarter and then the next quarter they'll fail to pay the premium again and we're back out after them again, we can't levy a penalty against them right now if they walk into court with the insurance in hand even if they've been out of compliance for a number of months, we can't impose a penalty at the time we get them into court to close them down if they have an insurance policy in hand. And so, essentially what they do is go months and months without insurance sometimes, and some of these employers we've gone after for five and six times, so it's not like it's a first time offense. So that's the kind of businesses employers we're talking about.

Buhler: We've really put the Industrial Commission in the situation of a dog chasing its tail on these kinds of things. We just really need to give it some teeth so that we can go after that small minority, minority of the minority of employers who do not provide this coverage and make it more expensive for them than if they have the coverage.

Committee: Is there any opposition to this bill?

Bill moved out favorably to the full Senate.

Tab E

UTAH LABOR COMMISSION

In the matter of:	*	
	*	**ORDER GRANTING**
ARNOLD & WIGGINS, P.C.	*	**MOTION FOR REVIEW**
	*	
	*	**Case No. 19871068014**
	*	

Arnold & Wiggins, P.C. asks the Utah Labor Commission to review the Administrative Law Judge's assessment of penalty against it pursuant to §34A-2-211(2) of the Utah Workers' Compensation Act.

The Labor Commission exercises jurisdiction over this motion for review pursuant to Utah Code Ann. §§63-46b-12, 34A-2-211(4)(c), and 34A-2-801(3).

ISSUE PRESENTED

Should the Commission waive the penalty assessed against Arnold & Wiggins for failure to maintain workers' compensation insurance?

DISCUSSION

The parties do not challenge the findings of fact set forth in the decision of the ALJ. It is clear that Arnold & Wiggins did not have workers' compensation coverage from March 31 to August 6, 1998. Section 34A-2-411(2) allows, but does not require, the Commission to impose a penalty against Arnold & Wiggins for its lack of workers' compensation coverage. Arnold & Wiggins argues that it should not be penalized because it is not at fault for the lapse in coverage.

The Commission notes the ALJ concluded "part of the fault for the failure to maintain insurance lies with the insurance carrier. . ." Arnold & Wiggins has provided copies of canceled checks showing that it paid its insurance premiums for March 31 through August 6, 1998 in a timely manner, and that the premium payments were accepted and cashed by the insurance company. This indicates Arnold & Wiggins made a good faith effort to maintain continuous workers' compensation insurance coverage. The Commission also notes that Arnold & Wiggins does not have a record of failing to maintain workers' compensation coverage.

Considering all the factors discussed above, the Commission finds it appropriate to set aside the $1,000 penalty previously imposed against Arnold & Wiggins.

ORDER

The penalty of $1,000 previously assessed against Arnold & Wiggins, P.C., is hereby set aside. It is so ordered.

Dated this 31st day of August, 1999.

R. Lee Ellertson
Commissioner

NOTICE OF APPEAL RIGHTS

Any party may ask the Labor Commission to reconsider this Order. Any such request for reconsideration must be received by the Labor Commission within 20 days of the date of this order. Alternatively, any party may appeal this order to the Utah Court of Appeals by filing a petition for review with the court. Any such petition for review must be received by the court within 30 days of the date of this order.